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code of federal regulations

Public Contracts and Property Management

ORIGINAL

41

CHAPTER 9

Revised as of July 1, 1982

022-003-94840-6

COMPLETED

692

THE NATIONAL ARCHIVES OF THE UNITED STATES
1934

code of federal regulations

Public Contracts and Property Management

41

CHAPTER 9

Revised as of July 1, 1982

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A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JULY 1, 1982

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1934

U.S. GOVERNMENT PRINTING OFFICE
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thus: 41 CFR 9-1.001

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16	as of January 1
Title 17 through Title 27	as of April 1
Title 28 through Title 41	as of July 1
Title 42 through Title 50	as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

HOW TO USE THE CODE OF FEDERAL REGULATIONS

The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

To determine whether a Code volume has been amended since its revision date (in this case, July 1, 1982), consult the "List of CFR Sections Affected (LSA)," which is issued monthly, and the "Cumulative List of Parts Affected," which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

EFFECTIVE AND EXPIRATION DATES

Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a date certain for expiration, an appropriate note will be inserted following the text.

OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to take steps to reduce the Federal paperwork burden for individuals, small businesses and State and local governments, as well as to maximize the usefulness of information collection. One specific requirement of the Act is for Federal agencies to display an OMB control number with the information collection request.

Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

OBSOLETE PROVISIONS

Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1973, consult either the List of CFR Sections Affected, 1949-1963, or 1964-1972, published in three separate volumes. For the period beginning January 1, 1973, a "List of CFR Sections Affected" is published at the end of each CFR volume.

CFR INDEXES AND TABULAR GUIDES

A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I), and Acts Requiring Publication in the Federal Register (Table III). A list of CFR Titles, Chapters, and Parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of Presidential documents appears at the end of each compilation of Title 3, The President.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the "Contents" entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

INQUIRIES AND SALES

For a summary, legal interpretation, or other explanation of any regulation in this volume, contact the issuing agency. Inquiries concerning editing procedures and reference assistance with respect to the Code of Federal Regulations may be addressed to the Director, Office of the Federal Register, National Archives and Records Service, General Services Administration, Washington, D.C. 20408 (telephone 202-523-3517). Sales are handled exclusively by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

JOHN E. BYRNE,
Director,
Office of the Federal Register.

July 1, 1982.

THIS TITLE

CONTENTS

Title 41—PUBLIC CONTRACTS AND PROPERTY MANAGEMENT consists of Subtitle A—Federal Procurement Regulations System, Subtitle B—Other Provisions Relating to Public Contracts and Subtitle C—Federal Property Management Regulations System. Subtitle D is reserved for other provisions relating to property management.

The Federal procurement regulations in Chapter 1 of Subtitle A are those government-wide procurement regulations issued by the General Services Administration. In Chapters 2 through 49 of Subtitle A are procurement regulations issued by individual government agencies. The first 49 parts in each of Chapters 2 through 49 are reserved for agency regulations *implementing* the Federal procurement regulations in Chapter 1 and are numerically keyed to them. The remaining parts in Chapters 2 through 49 contain agency regulations *supplementing* the Federal procurement regulations.

Other government-wide procurement regulations relating to public contracts appear in Chapters 50 through 100, Subtitle B.

The Federal property management regulations in Chapter 101 of Subtitle C are government-wide property management regulations issued by the General Services Administration. In the remaining chapters of Subtitle C are the *implementing* and *supplementing* property management regulations issued by individual government agencies. Those regulations which implement Chapter 101 are numerically keyed to it.

NUMBERING

The numbering system of Title 41 differs from that used for other titles of the *Code of Federal Regulations*. The numbering system is especially designed to permit the keying of agency regulations to government-wide regulations in Subtitles A and C which are issued by the General Services Administration. Chapters are designated by Arabic numerals. Each section number is a combination showing to the left of the decimal point the chapter and part numbers, separated by a dash. To the right of the decimal point the subpart, section, and subsection numbers are indicated in that order. Thus, an agency assigned to Chapter 2, and wishing to implement the cost-plus-a-fixed-fee contract provisions contained in Chapter 1, Part 1-3, Subpart 1-3.4, section 05, subsection 5 of the Federal Procurement Regulations (§ 1-3.405-5), would assign the section number "§ 2-3.405-5" to the implementing provisions.

Where material in the Federal Procurement Regulations (FPR) requires no implementation or deviation, there is no corresponding number in the agency regulations. Thus, there may be gaps in the sequence of numbers where the FPR, as written, are applicable to agency procurement.

ORGANIZATION

Title 41 is composed of thirteen volumes. The chapters in these volumes are arranged as follows: Chapter 1 (Parts 1-1 to 1-10), Chapter 1 (Parts 1-11 to App.)—Chapter 2, Chapters 3—6, Chapter 7, Chapter 8, Chapter 9, Chapters 10—17, Chapter 18 (Volumes I, II, and III), Chapters 19—100, Chapter 101, and Chapter 102 to end.

For this volume Beth R. Carter was Chief Editor. The Code of Federal Regulations publication program is under the direction of Martha B. Girard, assisted by Robert E. Jordan.

New Publication

List of CFR Sections Affected

(1964 through 1972)

A Research Guide

These two volumes contain a compilation of the "List of CFR Sections Affected (LSA)" for the years 1964 through 1972. Reference to these tables will enable the user to find the precise text of CFR provisions which were in force and effect on any given date during the period covered.

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Title 41—Public Contracts and Property Management

(This book contains Chapter 9)

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PART 9-1 GENERAL

Subpart 9-1.0 Regulation System

§9-1.001 Scope of subpart.

This subpart sets forth introductory information pertaining to the Department of Energy Procurement Regulations, hereinafter referred to as the DOE-PR, explains their purpose, authority under which they are issued, their relationship to the FPR system, applicability, method of issuance, exclusions, arrangement, and deviation procedure.

§9-1.002 Purpose.

(a) This subpart establishes Chapter 9, Department of Energy Procurement Regulations (DOE-PR), implementing and supplementing the Federal Procurement Regulations (FPR), and states its relationship to the FPR.

(b) Where the FPR coverage is sufficient to DOE needs, no additional coverage will be provided in the DOE-PR.

§9-1.003 Authority.

The DOE-PR are issued by the DOE Senior Procurement Official, Headquarters, with appropriate concurrences from other officials (e.g., Counsel, and any other appropriate headquarters offices) under authority delegated by the Secretary in accordance with the authority of Section 644 of the Department of Energy Organization Act of 1977 (P.L. 95-91), the Federal Property and Administrative Services Act of 1949, as amended, and other applicable law.

§9-1.004 Applicability.

(a) The FPR and DOE-PR apply to all DOE purchases and contracts for the procurement of property or services, except real property, which obligate appropriated funds, made within or outside the United States of America unless otherwise specified herein. In cases of procurements which obligate non-appropriated funds, these regulations shall be utilized as a guide to the maximum extent practicable. Requests for authority to deviate from the FPR and DOE-PR shall comply with procedures set forth in FPR 1-1.009 and §9-1.009.

(b) The DOE Procurement Regulations do not apply to the solicitation, award, administration, or use of any assistance instruments under the several DOE assistance programs. DOE assistance instruments are governed by the Department of Energy Assistance Regulation as published in 10 CFR II-600. An assistance instrument is defined as a legal instrument which reflects a relationship between the Federal Government and any eligible recipient in which the principal purpose of the relationship is the transfer of money, property, services or anything of value to such recipient in order to accomplish a public purpose of stimulation or support authorized by Federal statute, rather than acquisition by purchase, lease or barter, of property or services for the direct benefit or use of the Federal Government. Assistance instruments include grants, cooperative agreements, direct loans, loan guarantees, subsidies, direct payments, and insurance or assumptions of risk and technical assistance.

§9-1.005 Exclusions.

Certain DOE policies and procedures which come within the scope of this Chapter 9 may be excluded from DOE Procurement Regulations where there is appropriate justification, such as:

(a) Subject matter which bears a security classification (See FPR 1-1.005(a)).

(b) Matters dealing with Federal assistance programs where instruments other than procurement contracts will be awarded.

(c) Instructional or training material that explains more fully matters covered in the FPR and DOE-PR.

§9-1.006 Issuance.

§9-1.006-1 Code arrangement.

(a) The DOE-PR implement and supplement the FPR. Implementing material is that which expands upon or indicates the manner of compliance with related FPR material. Absence of a corresponding part, subpart, section, etc., in the DOE-PR indicates that the FPR material is applicable as written. Supplementing material is that for which there is no counterpart in the FPR.

(b) The effective date of FPR issuances throughout DOE will be the date indicated in the respective issuances unless otherwise provided in the DOE Procurement Regulations. FPR material will be repeated, paraphrased, or otherwise stated in the DOE-PR only to the extent necessary to implement or to indicate deviation from the FPR. DOE-PR material will be effective throughout DOE on the date indicated in the respective issuances.

§9-1.006-2 Publication.

The DOE Procurement Regulations appear in the Code of Federal Regulations as Chapter 9 of Title 41, Public Contracts and Property Management, and are published in the daily issues of the Federal Register, in cumulative form in the Code of Federal Regulations, and in separate looseleaf volume form.

§9-1.006-3 Copies.

Copies of the DOE Procurement Regulations published in the Federal Register and in the Code of Federal Regulations may be purchased by Federal agencies and the public at nominal cost from the Superintendent of Documents, Government Printing Office, Washington, DC 20402.

§9-1.007 Arrangement.

§9-1.007-1 General plan.

The DOE Procurement Regulations employ the same numbering system and nomenclature used in the FPR, and conform with Federal Register standards approved for the FPR.

§9-1.007-2 Numbering.

(a) Where the DOE Procurement Regulations implement the FPR, the implementing part, subpart, section or subsection of the DOE-PR will be numbered and captioned, to the extent possible, to correspond to the part, subpart, section, or subsection of the FPR.

(b) Where the DOE-PR supplements the FPR, the numbers 50 and up will be assigned to the parts, subparts, or sections involved.

(c) Where the subject matter contained in a part, subpart, section, or subsection of the FPR requires no implementation, the DOE-PR will contain no corresponding part, subpart, section, or subsection number and the subject matter as published in the FPR governs.

§9-1.008 Implementation.

(a) Procurement policies and procedures will be issued in the DOE-PR by the Senior Procurement Official, Headquarters, after appropriate concurrences from other officials.

(b) Implementing procedures, instructions, and guides which are necessary to clarify or to implement the DOE-PR within DOE field or Headquarters organizations may be issued by procuring activities. Procuring activities have the authority to establish the review and approval levels for various procurement actions, within their respective organizations, up to the dollar authority level delegated to that organization by the head of the agency and/or the Senior Procurement Official, Headquarters, providing the implementing procedures, instructions and guides:

(1) are consistent with the policies and procedures contained in this regulation as implemented and supplemented from time to time;

(2) to the extent practicable, follow the format, arrangement, and numbering system of this regulation; and

(3) contain no material which duplicates, paraphrases, or is inconsistent with the contents of this regulation.

§9-1.009 Deviation.

§9-1.009-2 Procedure.

(a) Requests for authority to deviate from the provisions of the FPR or the DOE-PR shall be submitted by letter as far in advance as the exigencies of the situation will permit. Each request for deviation shall contain the following:

(1) A statement of the deviation desired, including identification of the specific paragraph number(s) of the FPR or DOE-PR;

(2) The reason why the deviation is considered necessary or would be in the best interests of the Government;

(3) If applicable, the name of the contractor and identification of the contract affected;

(4) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;

(5) A description of the intended effect of the deviation;

(6) A statement of the period of time for which the deviation is needed; and

(7) Any pertinent background information which will contribute to a full understanding of the desired deviation.

(b) In individual cases, deviations from either the FPR or the DOE-PR will be authorized only when essential to effect necessary procurement or where special circumstances make such deviations clearly in the best interest of the Government. Heads of Procuring Activities (HPAs) are authorized to approve all deviations, (except for cost principles), in individual cases, within their delegated dollar authority, after coordination with Counsel and such other DOE personnel as required, with a copy to the Senior Procurement Official, Headquarters. Deviations, either in excess of an HPA's delegated dollar authority or involving cost principles contained in Parts 9-15, 9-50.15 and 9-50. 704, shall not be made unless such action is authorized by the Senior Procurement Official, Headquarters, after consultation with General Counsel, and any other appropriate Headquarters office, on the basis of a written justification stating clearly the special circumstances involved. For deviations from policies and procedures or clauses involving patents, data and copyrights, the concurrence of the Assistant General Counsel for Patents shall be obtained as provided in §9-9.107-4(k).

(c) Where deviations from the FPR or DOE-PR in classes of cases are considered necessary, requests for authority to deviate shall be submitted by letter to the Senior Procurement Official, Headquarters, who will, after appropriate concurrences from other officials (e.g., Counsel, and such other DOE personnel as required), consider the submission jointly with the General Services Administration (GSA) as appropriate. Class deviations to the FPR or the DOE-PR involving patents, data, and copyrights shall be forwarded to the Senior Procurement Official, Headquarters, via the Assistant General Counsel for Patents. Where circumstances preclude obtaining prior concurrence of GSA as required, the Senior Procurement Official, Headquarters, may authorize deviation and shall inform GSA of the deviation including the circumstances under which it was required.

§9-1.050 Amendment of regulation.

This regulation may be amended from time to time by the Senior Procurement Official, Headquarters, with appropriate concurrences from other officials (e.g., Counsel, and any other appropriate Headquarters offices).

§9-1.051 Other DOE publications.

§9-1.051-1 Procurement circulars, handbooks, and acquisition letters.

Policies, procedures, and information concerned primarily with procurement may be published in DOE procurement circulars, handbooks, and acquisition letters generally under the following circumstances:

(a) Procurement Circulars - To provide coverage on an interim basis, pending subsequent incorporation in this regulation;

(b) Procurement Handbooks - To provide extensive treatment of a subject that is not suitable for inclusion in this regulation;

(c) Acquisition Letters—to provide guidance to DOE personnel on internal procedures which are not suitable for publication in this regulation.

§9-1.051-2 Procurement Circulars (PC).

(a) In accordance with the authority in §9-1.051-1 above, a Procurement Circular, supplementary to this regulation, shall be published as often as may be necessary or advisable for distribution to all recipients of this regulation. Material to be published in each circular shall first be approved by the Senior Procurement Official, Headquarters, with appropriate concurrences from other officials (e.g., Counsel, and any other appropriate Headquarters offices).

(b) PCs will be identified by the prefix letter "PC" followed by the last two digits of the calendar year in which issued and will be numbered consecutively. For example, the first PC issued in calendar year 1979 will be identified as PC 79-1.

§9-1.051-3 Procurement Handbooks (PH).

(a) In accordance with the authority in §9-1.051-1 above, the Senior Procurement Official, Headquarters, with appropriate concurrences from other officials (e.g., Counsel, and any other appropriate Headquarters offices) may publish Procurement Handbooks (PH) from time to time.

(b) Handbooks will be identified by the prefix letter "PH" and will be keyed to the appropriate DOE-PR subpart. For example, a handbook on profit and fee analysis would bear the identity PH §9-3.808.

§ 9-1.051-4 Acquisition Letters (AL).

(a) In accordance with the authority in § 9-1.051-1 above, the Senior Procurement Official, Headquarters, or designee, may issue Acquisition Letters from time to time. They will remain in effect until cancelled.

(b) Acquisition Letters will be identified by the prefix letters "AL" followed by the last two digits of the calendar year in which issued and will be numbered consecutively. For example, the control number of the first letter issued in calendar year 1979 will be AL 79-1. When appropriate, the applicable subpart of the DOE-PR will be identified in the subject line.

Subpart 9-1.2 Definition of Terms

§9-1.201 Definitions.

For the purposes of this chapter, and unless otherwise indicated, the following terms have the meaning set forth in this subpart. FPR definitions not implemented herein also apply to this chapter.

§9-1.204 Head of the Agency.

"Head of the Agency" means the Secretary, Deputy Secretary, or Under Secretary.

§9-1.205 Procuring activity.

"Procuring activity" means a DOE organizational element which has been delegated authority by the Senior Procurement Official, Headquarters, to award contracts.

§9-1.206 Head of the Procuring Activity (HPA).

"Head of the Procuring Activity" means the senior official within a DOE organizational element who has overall responsibility for the supervision and direction of a procurement activity and who meets the following requirements: first, has been delegated authority to award contracts and appoint Contracting Officers by the Senior Procurement Official, Headquarters; and second, has been designated as an HPA. A partial listing of duties specifically reserved to the HPA or designee includes:

(a) Authority to establish review and approval levels for contract actions within his organization, up to the dollar level delegated to him.

(b) Authority to approve deviations from the FPRs and the DOE-PRs in accordance with §9-1.009-2.

(c) Authority to appoint Contracting Officers.

(d) Authority to ratify unauthorized contract and/or contract modification awards.

(e) Authority to make administrative determinations regarding withdrawals of bids before award in mistake in bid cases.

§9-1.250 Senior Program Official.

"Senior Program Official" means the Assistant Secretaries, Administrators of Administrations, Chairman, Federal Energy Regulatory Commission, Director, Office of Energy Research, and heads of DOE staff offices, or designees.

§9-1.251 Senior Procurement Official, Headquarters.

"Senior Procurement Official, Headquarters" means the Director of Procurement and Assistance Management, or designee.

Subpart 9-1.3 General Policies

§9-1.302-3 Contracts between the Government and Government employees or business concerns substantially owned or controlled by Government employees.

When the needs of the Government cannot be reasonably supplied by sources other than employees of the Government or sources which are substantially owned or controlled by Government employees, the Contracting Officer shall submit, through the HPA, a request to the Senior Procurement Official, Headquarters, with appropriate justification, for approval of an exception to the prohibitions contained in FPR 1-1.302-3.

§9-1.305 Specifications.

§9-1.305-1 Mandatory use of Federal Specifications.

(a) The policies and procedures established by FPR 1-1.305 shall be complied with for all direct procurement except as provided in §9-1.305-3.

(b) The paper specification standards published by the Joint Committee on Printing for the purchase of paper to be used on Government-owned printing, binding, and duplicating equipment shall be used in specifying paper requirements for "Federal Printing" as defined in the Government Printing and Binding Regulation.

§9-1.305-3 Deviations from Federal Specifications.

Subject to the requirements of FPR 1-1.305-3, Heads of Procuring Activities, Senior Program Officials, or designees, may authorize deviations from Federal Specifications in connection with direct procurement.

§9-1.305-5 Use of Federal and Interim Federal Specifications in construction contracts.

When specifications for construction are prepared by private firms, Heads of Procuring Activities, Senior Program Officials, or designees, are responsible for obtaining compliance with the general policies of this subpart to the extent practicable and compatible with meeting program objectives.

§9-1.306-1 Mandatory use and application of Federal Standards.

The policies and procedures established by FPR 1-1.306 for the development and use of Federal Standards shall be complied with to the same extent as provided for Federal Specifications in §9-1.305-1, §9-1.305-3, and §9-1.305-5.

§9-1.307 Purchase descriptions.

Specifications should be in such terms as to permit full and free competition among all potential suppliers. However, technical reasons may occasionally exist for using specifications which limit competition by requiring certain types of material or articles, such as replacement parts, auxiliary equipment, and tools required for use with major equipment. Restrictive specifications may be used to meet special requirements, provided (a) DOE needs cannot reasonably be met in any other manner, and (b) a complete written justification for the restriction is included in the contract file.

§9-1.313 Records of contract actions.

(a) The procurement file which shall be maintained by the Head of the Procuring Activity, or designee, shall include copies of all documents that present a historical record of the facts of the transaction. Basic papers of the procurement file shall be arranged and secured in a logical order so as to facilitate review and audit. A complete file shall be maintained and pertinent papers shall not be removed. Bulky material, such as unsuccessful proposals, specifications, drawings, etc., need not be kept in the file, but may be filed elsewhere under the contract number, cross referenced in both files. These records may be disposed of in accordance with approved records disposition schedules, subject to any special circumstances such as lawsuits, investigations, etc., warranting longer retention.

(b) Files of essential documents for all contracts and modifications shall include the information and supporting data in accordance with current Acquisition Policy Letters.

§9-1.317 Noncollusive bids and proposals.

When the Contracting Officer suspects the existence of collusive bidding and false certification, the case shall be referred to General Counsel for assistance.

§9-1.318 Disputes clause.

§9-1.318-1 Contracting Officer's decision under the Disputes clause.

(a) In addition to the information specified in FPR 1-1.318-1, a decision concerning a dispute which is or may be subject to the Disputes clause also shall include the Contracting Officer's written findings of fact.

(b) Such decisions shall be expeditiously prepared and transmitted to the contractor, together with a copy of the rules established by the DOE Board of Contract Appeals.

§9-1.350 DOE Specifications and Standards.

§9-1.351 Distribution of Federal Specifications and Standards.

(a) DOE does not maintain a central distribution point for specifications and standards. Index of Federal Specifications, Standards, and Handbooks may be obtained by submission of an order to the Superintendent of Documents, U.S. Government Printing Office, Washington, DC, 20402. Copies of Federal Specifications and Standards may be obtained in the same manner. Single copies of product specifications required for bidding purposes are available without charge at the Business Service Centers of the General Services Administration Regional Offices. Nongovernment activities should obtain copies of the Index and of Federal Specifications and Standards from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC, 20402.

(b) Field offices and Headquarters shall maintain current copies of the index and supplements and shall maintain files of current copies of Federal Specifications and Standards covering all items which are purchased on a recurring basis for which specifications or standards are available.

§9-1.352 Department of Defense Index of Specifications and Standards.

This index may be obtained from the Superintendent of Documents, Government Printing Office, Washington, DC, 20402. Copies of specifications and standards are ordered from the cognizant military activity developing each particular specification or standard.

§9-1.353 Prebidding and preproposal conferences.

(a) Wherever considered advantageous, particularly for the more complex, unusual, or large projects, a prebidding or preproposal conference should be held with prospective contractors and their suppliers prior to receipt of bids or proposals in connection with formally advertised or negotiated procurement.

(b) The primary objectives of such conferences are to avoid performance, production and construction problems and contingency items in bids or proposals by:

(1) outlining principal features of the project;

(2) answering questions and identifying any ambiguity or obscurity concerning the proposed work and the plans and specifications;

(3) soliciting prospective contractors' opinions on matters such as feasibility of proposed performance, production or construction techniques and tolerances; and

(4) soliciting prospective contractors' suggested changes in design or in provisions of the proposed contract which could result in more economical production or construction.

(c) Changes or clarifications found to be necessary as a result of a prebidding or preproposal conference shall be included in addenda to the invitation for bids or request for proposals.

(d) Such conferences may also be held prior to the issuance of invitations for bids or requests for proposals when the main objective is to obtain the view of prospective contractors on matters such as production or construction techniques.

§9-1.354 Contract close-out.

(a) The Head of the Procuring Activity shall ensure that necessary procedures and milestone schedules are established and resources applied to effect the earliest practicable deobligation of projected excess funds and the timely close-out of all procurements which are physically completed or otherwise eligible for close-out action. The following final milestones after physical completion are to be used in establishing close-out schedules: fixed-price purchase orders—3 months; firm fixed-price contracts and SRCs—6 months; all others—20 months.

(b) Quick close-out procedures for cost reimbursable and flexibly priced type contracts are covered under §9-3.705-50.

§ 9-1.355 Contracts conditioned upon the availability of funds.

(a) There are many day-to-day supplies and services which must be provided on a continuing basis if the Department is to function efficiently. These requirements are generally funded under yearly operation and maintenance appropriations. A disruption in providing these requirements would seriously impact the orderly operation of the Department.

(b) When it is necessary to initiate a procurement properly chargeable to funds of a new fiscal year prior to the availability of such funds, the clause in paragraph (c) of this section shall be included in the contract.

This clause shall be used only for administrative operations and continuing services (such as rentals, utilities, and guard services) which are necessary for normal operation and for which the Congress consistently appropriates funds.

(c) The following clause shall be used as described in paragraph (b) this section:

Availability of Funds—Award

Funds are not presently available for this procurement. The Government's obligation hereunder is contingent upon the availability of appropriated funds from which payment for the contract purposes can be made. No legal liability on the part of the Government for payment of any money shall arise unless and until the funds are made available to the Contracting Officer for this procurement and notice of such availability, to be confirmed in writing by the Contracting Officer, is given to the contractor.

(d) When the clause in paragraph (c) of this section is used, the supplies or services shall not be accepted by the Department until funds are available to the Contracting Officer for the procurement and until the Contracting Officer has given notice to the contractor (to be confirmed in writing) of such availability. Records shall be maintained to insure adequate administrative control of funds.

§ 9-1.356 Solicitations conditioned upon the availability of funds.

(a) There may be instances in which advance procurement planning indicates that the administrative leadtime necessary to allow contract award by a required date will require release of the solicitation prior to the availability of funds. In such circumstances, the best interests of the Department may be served by early release of the solicitation document in advance of funding available for an award. Any solicitation released for such reason, shall include the clause set forth at paragraph (c) of this section.

(b) *Limitation.* Solicitations shall not be released in advance of the availability of funds unless the initiating office obtains a certificate from the responsible budget officer to the effect that funding for the action has been included in a budget request released by the President to the Congress.

(c) The following clause shall be used when solicitations are released in advance of the availability of funds:

Availability of Funds—Solicitation

Funds have not, as of the date of issuance of this solicitation, been made available to the Contracting Officer for award of a contract anticipated by this solicitation. It is expected that sufficient funds will become available for award prior to the contemplated contract award date. Offerors are advised that should funds not be made available, it will be necessary to either cancel this solicitation or make an award subject to inclusion of the clause entitled "Availability of Funds—Award" set forth at 41 CFR 9-1.355(c). The Government will not be responsible for any expenses incurred by others in connection with this solicitation.

Subpart 9-1.4 Procurement Responsibility and Authority

§9-1.401 Responsibility of the Head of the Procuring Activity.

The Head of the Procuring Activity is responsible for the conduct of an effective and efficient procurement program. Adequate controls shall be established to assure compliance with applicable laws, regulations, procedures, and the dictates of good management practices. Periodic reviews shall be conducted by qualified personnel, preferably assigned to positions other than in the particular procurement office or portion thereof being reviewed, to determine the extent of adherence to prescribed policies, regulations and good management practices, and to identify any needs for improvement, guidance and/or training.

§9-1.403 Requirements to be met before taking contractual action.

(a) No contract shall be entered into, modified, or terminated unless all required reviews, clearances, or approvals have been obtained and legal requirements, the FPR, the DOE-PR, and other applicable regulations have been met.

(b) In addition to the requirements specified in paragraph (a), no negotiated contract shall be entered into until the determinations and findings required by Parts 1-3 and §9-3 with respect to the circumstances justifying negotiation and use of any special method of contracting have been made. Solicitations will not be issued to prospective contractors until all required determinations and findings have been made.

§9-1.404 Selection, appointment, and termination of appointment of Contracting Officers.

§9-1.404-1 Selection.

In selecting Contracting Officers, the appointing authority shall consider experience, training, education, business acumen, judgment, character, reputation, and ethics. Appointment of contracting officers shall be in accordance with the requirements of current Acquisition Letters.

§9-1.404-3 Termination of designation.

The appointment of a Contracting Officer may be revoked at any time by the appointing authority, but no such revocation shall operate retroactively. Revocation of the appointment shall be made by letter, reading substantially as follows:

....................................(Date)

TO: (Name, grade, and position title)

FROM: (Appointing Authority)

SUBJECT: Termination of Appointment as Contracting Officer
Certificate of Appointment, Serial No. ....

1. Your appointment as Contracting Officer contained in the subject Certificate is hereby terminated effective ....19..............

....................................(Signature and Title)

§9-1.404-50 Modification.

To accomplish modification of a Contracting Officer's authority, the present appointment shall be revoked, and a new certificate issued.

§9-1.405 Ratification of unauthorized contract awards.

(a) The Government is not generally bound by agreements or contractual commitments made to contractors or prospective contractors by persons to whom procurement authority has not been delegated. Such unauthorized acts may be in violation of the Federal Property and Administrative Services Act, other Federal laws, the FPR, the DOE-PR and good procurement practice; e.g., certain requirements of law and regulation necessary for the proper establishment of a contractual obligation may not be met, such as certification of the availability of funds, determinations and findings, competition of sources, determination of contractor responsibility, price/cost analysis, administrative approvals, negotiations of appropriate contract clauses, etc.

(b) Unauthorized commitments shall not be ratified unless it would have been otherwise proper to enter into a contract prior to the commitment. As used herein, the phrase "otherwise proper" means that a ratification of an unauthorized commitment can be made only if there occurred no violation of any substantive legal requirements, e.g., there can be no ratification unless a sole source can be justified; a determination made that the contractor is not debarred or otherwise ineligible for award; the Organizational Conflict of Interest reviews and determinations, if required, are completed; and where all other substantive legal requirements have been met. Whenever it is discovered that any person is performing work as a result of an unauthorized commitment, that person shall be advised that such work is being performed at their own risk pending establishment of valid contractual coverage. The HPA shall then be notified of the circumstances. If the HPA agrees that the work appears to be without valid authorization, the HPA will take appropriate steps to resolve the matter if within his or her area of cognizance. If outside the HPA's normal area of cognizance, the Senior Procurement Official and Senior Program Official will be notified by the HPA. If they determine that an unauthorized commitment exists, they will arrange for the appropriate contracting office to contact the person and direct that the work be stopped or arrange for valid contractual coverage. The Contracting Officer shall direct the disposition of all products and deliverables received by the Government as a result of an unauthorized commitment.

(c) Requests received by Contracting Officers for ratification of commitments made by personnel lacking contracting authority shall be processed as follows:

(1) The individual who made the unauthorized contractual commitment shall furnish the Contracting Officer all records and documents concerning the commitment and a complete, written statement of facts, including, but not limited to, a statement as to why the procurement office was not used, why the proposed contractor was selected and a list of other sources considered, description of work to be performed or products to be furnished, estimated or agreed contract price, citation of appropriation available, and a statement as to whether the contractor has commenced performance. Under exceptional circumstances, such as when the person who made the unauthorized commitment is no longer available to attest to the circumstances of the unauthorized commitment, the Senior Procurement Official may waive the requirement that the responsible employee initiate and document the request: *Provided,* The cognizant Assistant Secretary or the Head of the Procuring Activity determines in writing that the commitment was in fact made by an employee who shall be identified in the determination.

(2) The request for ratification, an approved justification for noncompetitive procurement, and the information required by Section 9-1.405(c)(1) must be forwarded to the cognizant Assistant Secretary, or HPA, based on the source of funds for the proposed contract, for that person's concurrence, together with recommended corrective actions to preclude reoccurrence.

(3) If the Assistant Secretary, or HPA concurs with the request for ratification, the request and concurrence shall be forwarded to the Senior Procurement Official. The Senior Procurement Official will review the request, the Justification for Non-Competitive Procurement, along with any comments or information submitted by the Contracting Officer which should be considered in evaluation of the request, and the information submitted in accordance with DOE-PR 9-1.405(c)(2). Based upon this review and advice from the Office of General Counsel, the Senior Procurement Official will proceed as follows:

(i) If the request submitted does not appear to be justified, it will be returned to the concurring Assistant Secretary or equivalent official without approval with an explanation of the decision not to ratify.

(ii) If the request and the recommended corrective actions appear justified and adequate, the Senior Procurement Official may ratify the action and return the file to the Contracting Officer for action and monitor the implementation of the corrective action plan.

(iii) A detailed record of the review shall be maintained for audit purposes.

§9-1.450 Responsibility of other Government personnel.

§9-1.450-1 General.

(a) Responsibility for the decision of what to buy and when to buy rests with program and certain staff offices and the head of the agency or designee. Responsibility for determining how to buy, the conduct of the buying process, and execution of the contract rests with the procurement activity, the Contracting Officer in particular.

(b) Personnel responsible for making decisions to buy should maintain a close and continuous relationship with their procurement activity to ensure that procurement personnel are made aware of contemplated procurement actions. This will be mutually beneficial in terms of better planning for procurement action and more timely, efficient, and economical procurement.

(c) Personnel not delegated contracting authority may not commit the Government, formally or informally, to any type of contractual obligation. However, program personnel who must use the contracting process to accomplish their programs, must support the Contracting Officer in ensuring that:

(1) requirements are clearly defined and specified;

(2) competitive sources are solicited, evaluated and selected;

(3) quality standards are prescribed and met;

(4) performance or delivery is timely;

(5) prices, estimated costs, and fees are reasonable; and

(6) files are documented to substantiate the judgments, decisions, and actions taken.

§9-1.451 Contracting Officer's representatives.

(a) A Contracting Officer may designate Government personnel to act as authorized representatives for such functions as inspection, approval of shop drawings, testing, approval of samples, and other functions of a technical nature not involving a change in the scope, price, terms, or conditions of the contract or order. Such designation shall be in writing and shall contain specific instructions as to the extent to which the representative may take action for the Contracting Officer, but will not contain authority to sign contractual documents. The responsibilities and limitations of the Contracting Officer's representatives may be set forth in the contract or in a separate letter, a copy of which shall be furnished to the contractor.

(b) A person assigned to and performing primary duty within a procurement office, and who is under the supervision of a Contracting Officer, does not require designation as a representative to perform assigned duties. The Contracting Officer cannot authorize employees to sign any contract document or letter where the signature of a Contracting Officer is required.

§9-1.452 Standards of conduct.

The business ethics of all persons charged with administration and expenditure of Government funds must be above reproach and suspicion in every respect at all times. It is important that all persons engaged in procurement and related duties adhere to and be guided by DOE policies and instructions on personnel conduct. Detailed rules applicable to the conduct of employees are set forth in 10 CFR, Part 1010.

Subpart 9-1.5 Contingent Fees

§9-1.500 Scope of subpart.

This subpart prescribes the use by DOE of the "covenant against contingent fees" and sets forth the policies in regard to DOE procurement.

§9-1.501 Applicability.

The policies and requirements of FPR Subpart 1-1.5 shall be applied to all DOE procurement activities.

§9-1.507 Use of Standard Form 119.

§9-1.507-1 Form prescribed.

Each Standard Form 119 completed in connection with a DOE contract, together with other relevant information, shall be reviewed by Counsel prior to the initiation of appropriate action. An information copy of each such form, together with a record of action taken, shall be forwarded to the Senior Procurement Official, Headquarters.

Subpart 9-1.6 Debarred, Suspended, and Ineligible Bidders

§9-1.600 Scope of subpart.

This subpart implements and supplements the policies and procedures set forth in FPR Subpart 1-1.6 relating to the debarment, suspension, or ineligibility of bidders for any cause.

§9-1.602 Establishment and maintenance of a list of concerns or individuals debarred, suspended, or declared ineligible.

The Senior Procurement Official, Headquarters, shall establish and maintain a list of firms or individuals debarred, suspended, or declared ineligible for contracts with DOE and with DOE contractors holding cost-reimbursement type contracts. This list shall be designated as the DOE Consolidated List of Debarred, Ineligible, and Suspended Contractors and its use by all DOE procuring activities is mandatory. The Senior Procurement Official, Headquarters, shall periodically publish this list and distribute it to DOE Contracting Officers.

§9-1.602-1 Bases for entry on debarred, suspended, or ineligible list.

The Senior Procurement Official, Headquarters, shall place all firms and individuals within the categories specified in FPR 1-1.602-1 and 1-1.604 on the DOE Consolidated List of Debarred, Ineligible, and Suspended Contractors as soon as determination is made of debarment, ineligibility, or suspension. DOE debarments under FPR 1-1.604 are subject to the procedural requirements in §9-1.606.

§9-1.603 Treatment to be accorded firms or individuals in debarred, suspended, or ineligible status.

The Senior Procurement Official, Headquarters, or designee, may determine, pursuant to FPR 1-1.603(a), that an exception is essential to the public interest for a specific procurement action only. Such action shall be documented to reflect the determination and the justification therefor.

§9-1.606 Agency procedure.

§9-1.606-1 DOE procedural requirements.

This section establishes DOE internal procedures for giving effect to FPR Subpart 1-1.6 as required by FPR 1-1.606.

§9-1.606-50 Reporting procedures.

Heads of Procuring Activities, or designees, are responsible for reporting any evidence of offenses or irregularities which may be grounds for debarment, ineligibility or suspension. The report shall be made to the Senior Procurement Official, Headquarters. The report shall contain a full statement of facts, and shall be supported by appropriate exhibits. If all necessary information is not readily available, a preliminary report shall be forwarded to be followed as soon as practicable by a completely documented report.

§9-1.606-51 Collection of information and investigation.

The Senior Procurement Official, Headquarters, shall collect and evaluate information to determine whether an alleged offense or irregularity warrants the initiation of a debarment proceeding and may request an investigation.

§9-1.606-52 Initiation of action.

The Senior Procurement Official, Headquarters, with the concurrence of Counsel and after consultation with appropriate offices, shall determine whether causes and conditions exist to initiate a debarment action or to issue a notice of suspension.

§9-1.606-53 Notice of proposed debarment.

(a) The Senior Procurement Official, Headquarters, shall initiate a debarment proceeding by sending a notice of proposed debarment by registered mail (return receipt requested) to the firm or individual proposed for debarment.

(b) A notice of proposed debarment will:

(1) Concisely state the facts on which the proposed debarment is predicated.

(2) Specify the period of the proposed debarment.

(3) Inform the firm or individual of the action which DOE may take in the event a low bid or proposal is received from the firm or individual before the proposed debarment is finally determined.

(4) Inform the firm or individual of its right, within 20 days of the date of the notice of the proposed debarment, or such other time as may be specified in the notice, to request a hearing.

(5) Provide that the firm or individual may submit a written reply to the notice of proposed debarment within 20 days of its date, or such other time as may be specified in the notice. It shall further explain:

(i) That the reply shall set forth the facts on which the firm or individual intends to rely in contesting the Government's claim; and

(ii) That if a hearing is desired by the firm or individual, it must be specifically requested.

(6) Inform the firm or individual that if no reply or request for hearing is received within the time specified in the notice of proposed debarment, that the right to a debarment hearing shall be forfeited as of the date specified in the notice.

§9-1.606-54 Hearing.

A hearing, if requested, snall be conducted before the DOE Board of Contract Appeals. (See 10 CFR 703.117, "Hearings") The Board of Contract Appeals has the final agency authority to decide debarment cases provided that a hearing has been requested as provided in the notice.

§9-1.606-55 Final debarment determination after forfeiture of the right to be heard.

(a) If the Senior Procurement Official, Headquarters, on the basis of an analysis of all information, determines that the proposed debarment is not warranted, that official shall notify, in writing, the firm or individual concerned within 40 days after the notice of proposed debarment.

(b) If the Senior Procurement Official, Headquarters, on the basis of an analysis of all information, determines that the proposed debarment is warranted, that official shall transmit the recommendation for debarment, and all information on which such recommendation is based, to the head of the agency or designee. If the head of the agency or designee determines in writing to debar, the Senior Procurement Official, Headquarters, shall notify, in writing, the firm or individual within 40 days after the notice of proposed debarment. The determination shall accompany the notice confirming the proposed debarment. The notice confirming the proposed debarment shall state the effective date and the period of the debarment. The period of the debarment shall be no greater than that specified in the notice of proposed debarment.

§9-1.606-56 Notice of final debarment determination.

(a) The Senior Procurement Official, Headquarters, shall promptly notify all Senior Program Officials and Heads of Procuring Activities of all debarment actions taken pursuant to this subpart.

(b) The Senior Procurement Official, Headquarters, shall notify the General Services Administration of the names of all firms or individuals placed on or removed from the DOE list.

Subpart 9-1.7 Small Business Concerns

§9-1.700 General.

This subpart sets forth the policies for the utilization of small business concerns in DOE procurements. The policies and procedures prescribed in FPR 1-1.7 and this subpart apply to all DOE procurements.

§9-1.703-1 Certification.

The following certifications are to be used in procurements exceeding $10,000.

(a) The offeror certifies that he is ( ) is not ( ) a small business concern as defined in accordance with Section 3 of the Small Business Act (15 U.S.C. 832).

(b) The offeror certifies that he is a small business as set forth in (a) above and is ( ) is not ( ) owned and controlled by socially and economically disadvantaged individuals. Such a firm is defined as one—

(1) Which is at least 51 per centum owned by one or more such individuals or, in the case of a publicly owned business, at least 51 per centum of the stock is owned by such individuals.

(2) Whose management and daily business operations are controlled by one or more such individuals, and

(3) Which certifies concerning said ownership and control in accordance with paragraph (c) of this section.

(c) The offeror certifies that his is ( ) is not ( ) a minority individual(s) in accordance with paragraph (c)(1) of this section or that he is ( ) is not ( ) socially and economically disadvantaged in accordance with paragraph (c)(2) or (c)(3) of this section. Socially and economically disadvantaged individuals are defined as:

(1) United States citizens who are Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans or other specified minorities;

(2) Any other individual found to be disadvantaged pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637); or

(3) Any other individual defined by the Small Business Administration as socially and economically disadvantaged, for purposes relating to other sections of the Small Business Act.

Failure to execute all parts of the representation will be deemed a minor informality and the bidder or offeror shall be permitted to satisfy the requirement prior to award.

§9-1.704 Agency program direction and operation.

§9-1.704-1 DOE headquarters.

The Director of Small and Disadvantaged Business Utilization (SDBU), Headquarters, is responsible for the administration of the DOE small and small disadvantaged business programs. This includes responsibility for developing, implementing, executing, and managing these programs, providing advice on these programs, and representing DOE before other Government agencies on matters primarily affecting small and small disadvantaged businesses.

§9-1.704-2 Other procuring activities.

Heads of Procuring Activities (HPAs) or designees, with the advice and consent of the Director, SDBU, shall appoint a small business/small disadvantaged business (SB/DB) specialist.

§9-1.705-3 Screening of procurements.

(a) Individual Set-Asides. The Department has established a comprehensive review and screening process of procurement actions for possible participation in those actions by small business, small disadvantaged business, and labor surplus area concerns (see §9-16.804).

(b) Initiation of Class Set-Asides. (1) Class Set-Asides. By agreement with SBA, DOE has established a class set-aside for procurements of construction where the estimated value is from $10,000 through $3,000,000, including new construction and repair and alteration of structures. Lists of other class set-asides shall be maintained by all DOE procuring offices, including contractors who manage Government-owned sites. These lists shall be updated at least annually.

(2) In establishing and reviewing small business class set-asides, consideration shall be given to contracting with SBA pursuant to FPR 1-1.705-7 as well as the set-aside priorities in FPR 1-1.706-1. The list of class set-asides maintained at DOE and contractor procuring activities shall identify corresponding priorities.

§9-1.705-7 Performance of contract by SBA.

(a) Consideration will be given to contracting with SBA in order to foster or assist in the establishment or growth of SBA-designated socially and economically disadvantaged small business concerns.

(b) The SBA has delegated to its field offices authority to negotiate contracts and subcontracts under Section 8(a) of the Small Business Act. Heads of procuring activities or designees should assure full cooperation with SBA in efforts to place procurements with firms which are eligible for subcontract awards by SBA under Section 8(a). They shall take the necessary steps to:

(1) Invite appropriate SBA field representatives to identify needs for 8(a) contracts and to provide for cooperation and assistance on the part of DOE in verifying the availability or nonavailability of requirements, funding and other pertinent factors;

(2) Propose any requirements which appear to offer potential opportunity for contracting with SBA under the authority of Section 8(a) of the Small Business Act, for consideration by appropriate SBA field representatives; and

(3) Work out detailed arrangements for individual 8(a) contracts with SBA offices, consistent with FPR 1-1.712. Any problems relating to contracting with SBA should be reported to the Director, SDBU, Headquarters.

(c) Once a product or service has been procured successfully from the SBA, future requirements for similar products or services shall be considered for procurement from SBA. The SB/DB specialist shall maintain a list of recurring procurements subject to this subsection.

§9-1.706 Procurement set-aside for small business.

§9-1.706-1 General.

(a) Procurements of $10,000 or less awarded through small purchase procedures, are set-aside for small business. (See §9-3.601)

(b) In addition to paragraph (a) of this section, Contracting Officers are authorized and encouraged to seek set-asides for all susceptible procurements including procurement of architectural and engineering services, research, development, test and evaluation.

(e)(1) In lieu of the set-aside priorities set forth in FPR 1-1.706-1(a) and (e), DOE shall award contracts, and encourage the placement of subcontracts for procurement to small business concerns in the following manner:

(i) Concerns which are small business concerns and which are located in labor surplus areas, on the basis of a total set-aside;

(ii) Concerns which are small business concerns, on the basis of a total set-aside;

(iii) Concerns which are small business concerns and which are located in a labor surplus area, on the basis of a partial set-aside; and

(iv) concerns which are small business concerns, on the basis of a partial set-aside.

(2) After priority is given to the small business concerns specified in subsection (e), priority shall also be given to the awarding of contracts and the placement of subcontracts, on the basis of a total set-aside, to concerns which:

(i) Are not eligible under subsection (e);

(ii) Are not small business concerns; and

(iii) Will perform a substantial proportion of the production of those contracts and subcontracts within areas of concentrated unemployment or underemployment or within labor surplus areas.

(3) See FPR 1-1.801 for the definition of a concern located in a labor surplus area.

§9-1.706-5 Total set-asides.

It is DOE policy to use the preferred method of procurement known as "Small Business Restricted Advertising" for contracts involving total set-asides unless there are circumstances which make conventional negotiation necessary.

§9-1.710 Subcontracting with small business concerns.

Procuring activities shall maintain lists of active prime contracts containing the clause entitled "Subcontracting Plan for Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals."

§9-1.710-3 Required clauses.

(a) On April 20, 1979, the Office of Federal Procurement Policy (OFPP) issued, in the Federal Register (44 FR 23610), its implementation of Section 211 of Pub. L. 95-507. This issuance as modified on June 18, 1979 (44 FR 35068), contains various subcontracting provisions and guidance for their use. FPR Temporary Regulation 50 (44 FR 38478) requires the use of OFPP's clauses and procedures.

DOE activities shall not utilize Part D, "Incentive Subcontracting Program," of OFPP's April 20, 1979 issuance, without prior approval of the Senior Procurement Official, Headquarters, or his designee.

(c) The following contract clause is to be included in formally advertised and negotiated procurements when there is a requirement for a small and small disadvantaged business subcontracting plan. Contracting Officers may modify this clause to specify the forms on which quarterly reports are to be submitted.

"Subcontracting Plan for Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals."

(a) the contractor agrees to comply in good faith with the Small and Small Disadvantaged Business Concerns Subcontracting Plan which is hereby incorporated in and made a part of this contract. In this connection, the contractor shall:

(1) Use his best efforts to attain such percentage goals as may be set forth in the plan.

(2) Designate an individual who will:

(i) Maintain liaison with the Government on matters relating to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals;

(ii) Monitor compliance with the clause entitled "Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals"; and

(iii) Administer the contractor's plan.

(3) Provide adequate and timely consideration of the potentialities of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals in all "make-or-buy" decisions.

(4) Assure that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals will, consistent with efficient performance of the contract, have the maximum practicable opportunity to compete for subcontracts, particularly by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of such concerns. Where the Contractor's lists of potential subcontractors which are small business and small business concerns owned and controlled by socially and economically disadvantaged individuals are excessively long, reasonable effort shall be made to give all such concerns an opportunity to compete over a period of time.

(5) Maintain records showing:

(i) Whether each subcontractor is a small business concern or a small business concern owned and controlled by socially and economically disadvantaged individuals; and

(ii) Procedures which have been adopted to comply with the plan and the policies set forth in this clause.

(6) Notify the Contracting Officer before soliciting bids, quotations, or proposals on any subcontract (including purchase orders) in excess of $10,000 if:

(i) No small business concern or small business concern owned and controlled by socially and economically disadvantaged individuals is to be solicited, and

(ii) The Contracting Officer's consent to the subcontract is required by a "Subcontracts" clause in this contract. Such notification will state contractor's reasons for nonsolicitation of small business and small business concerns owned and controlled by socially and economically disadvantaged individuals and will be given as early in the procurement cycle as possible so that the Contracting Officer may suggest potentially qualified small business concerns or small business concerns owned and controlled by socially and economically disadvantaged individuals. In no case will the procurement action be held up when to do so would, in the Contractor's judgment, delay performance under the contract and the Contractor's notification shall specify that he is proceeding with the solicitation.

(7) Include the clause "Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals" in all subcontracts over $10,000 which offer further subcontracting opportunities.

(8) Cooperate in any studies or surveys of the Contractor's subcontracting procedures and practices as may be required by the DOE or the Small Business Administration.

(9) Submit quarterly reports of subcontracting to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals on such forms as may be specified elsewhere in this contract.

(b) The Contractor agrees that failure to comply in good faith with the clause entitled "Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals," or the terms of the subcontracting plan incorporated into the contract will be a material breach of the contract and the contract may be terminated in whole or, in part, for default.

(c) The contractor further agrees to insert in all subcontracts hereunder (except those with small business concerns) which contain the clause entitled "Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals," which offer further subcontracting opportunities, and which may exceed $1,000,000 in the case of a subcontract for the construction of any public facility or in excess of $500,000 in the case of all other subcontracts, provisions which shall conform substantially to the language of this clause, including this paragraph (c), and to notify the Contracting Officer of the names of such subcontractors.

(d) The provisions of this clause shall not apply to small business concerns.

§9-1.710-5 Subcontracting certification.

The following certification shall be used in solicitations expected to exceed $500,000 or $1,000,000 if solely for construction of a public facility which contain the "Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals."

(a) The offeror represents that the following conditions prevail which determine whether the firm shall be required to submit a subcontracting plan for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals:

(1) He is ( ) a small business as defined in accordance with 13 CFR, Part 121 of the SBA regulations;

(2) Subcontracting possibilities are not offered with respect to this contract ( ); and

(3) The contract is not expected to exceed $1,000,000 (if solely for construction of a public facility) or $500,000 otherwise ( ).

(b) The offeror represents that he is not ( ) required to submit plans for subcontracting with small and small disadvantaged businesses because he has properly executed one or more of the above representations.

§9-1.750 Access to procurement information.

For any contract (except those which will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico or which is for services which are personal in nature) to be let by the Department, any small business concern, upon its request, shall be provided:

(a) A copy of the bid sets and specifications with respect to the contract;

(b) The name and telephone number of the Contracting Officer responsible for the contract; and

(c) Adequate citations to each major Federal law or Department rule which must be complied with in performing the contract.

§9-1.751 Small business set-aside—recurring procurements.

Once a product or service has been procured successfully on the basis of a total or partial small business set-aside, future requirements for similar products or services shall be considered for small business set-asides. (See 9-3.601.) The SB/DB specialist shall maintain a list of recurring procurements subject to this subsection.

Subpart 9-1.8 Labor Surplus Area Concerns

§9-1.800 General.

(a) This subpart sets forth the policies for the utilization of labor surplus area (LSA) concerns in DOE procurements.

(b) Procurement actions shall be reviewed for potential labor surplus area set-aside consideration in accordance with §9-16.804-4.

§9-1.802-1 General policy.

It is the policy of DOE to award appropriate contracts to, and to execute agreements with, eligible labor surplus area concerns and to encourage prime contractors to place subcontracts with concerns which will perform substantially in labor surplus areas. (See FPR 1-1.8.)

§9-1.804 Total set-aside.

It is DOE policy to use the preferred method of procurement known as "labor surplus area restricted advertising" for contracts involving total set-asides unless there are circumstances which make conventional negotiation necessary.

§9-1.805 Subcontracting with labor surplus area concerns.

(a) DOE encourages prime contractors to place subcontracts, including purchase orders, with labor surplus area concerns.

(b) Procuring Activities shall maintain lists of active prime contracts of $500,000 or more which contain the Labor Surplus Area Subcontracting Program Clause set forth in FPR 1-1.805-3(b). Lists shall contain:

(1) The title, address, and telephone number of the prime contractor's liaison office.

(2) Estimated dollar value of the contract.

(3) Period of performance.

(4) Nature of the work to be performed.

(5) Contract number.

§9-1.807 Records and reports.

Records and reports shall be as required by "A Guide to Preparation of DOE Quarterly Procurement and Financial Assistance Reports."

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Subpart 9-1.9 Reporting Possible Antitrust Violations

§9-1.901 General.

The procedures prescribed in FPR Subpart 1-1.9 apply to all procurements on a competitive basis.

§9-1.902 Documents to be transmitted.

The Office of the General Counsel is responsible for reporting cases of possible antitrust violations to the Attorney General. Heads of Procuring Activities shall furnish two copies of the documents referred to in FPR 1-1.902 to the Office of the General Counsel and one copy to the Senior Procurement Official, Headquarters.

Subpart 9-1.10 Publicizing Procurement Actions

§9-1.1003 Synopses of proposed procurements.

(a) In accordance with the requirements of FPR 1-1.003-2, procuring activities shall forward the synopses of proposed procurement to the Department of Commerce in accordance with FPR 1-1.1003-6 and 1-1.1003-7.

(b) The file shall contain a reference to the applicable exceptions of FPR 1-1.1003-2(a)(1)-(10) when a proposed procurement is not synopsized pursuant to one of the Federal Procurement Regulations exceptions.

§9-1.1004 Synopses of contract awards.

Procuring activities shall forward by mail, one copy of the synopsis of contract award, as required by FPR 1-1.1004, to Headquarters, Office of Public Affairs. Awards of classified contracts to be performed within the United States, exceeding $25,000 in amount, shall be publicized where sufficient information of an unclassified nature can be provided in the synopsis so that such publication would be advantageous to industry or the government.

Subpart 9-1.11 Qualified Products

§9-1.1101 Procurement of qualified products.

(a) This subpart prescribes policies and procedures for the procurement of qualified products established by the Government.

(b) Whenever procurement of qualified products is to be made by formal advertising, the Contracting Officer shall insert in invitations for bids, the provision contained in FPR 1-1.1101(b). This provision may be modified with the advice of Counsel for use in requests for proposals.

§9-1.1150 Distribution of qualified products lists.

Qualified products lists are distributed by GSA directly to Headquarters and field offices. These lists shall be redistributed to those persons authorized to use them. Heads of Procuring Activities shall maintain records of distribution of the lists. Extra copies may be obtained through the Senior Procurement Official, Headquarters.

Subpart 9-1.12 Responsible Prospective Contractors

§9-1.1200 Scope of subpart.

This subpart implements and supplements the policies set forth in FPR 1-1.12.

§9-1.1203-2 Additional standards.

A prospective contractor, in order to be determined as responsible must, in the opinion of the Contracting Officer, meet the following standards as they relate to the particular procurement under consideration:

(c) Have an established system of accounting and financial controls which the Contracting Officer determines will permit the effective administration of the type of contract proposed, particularly if under its terms, the costs incurred are a factor in determining the amount payable under the contract, or if advance or progress payments are requested.

(d) Have adequate financial resources. In determining the adequacy of a prospective contractor's financial resources for the performance of the proposed contract, as required by FPR 1-1.1203-1(a), particular attention shall be given to the ability of the contractor to discharge his full financial responsibility for charges and losses of Government-furnished material, such as special nuclear materials, when the contractor has responsibility for such material.

§9-1.1204 Determination of responsibility or nonresponsibility.

(a) While the signing of the contract shall be deemed to be evidence of the Contracting Officer's affirmative determination that a contractor is responsible within the meaning of FPR 1-1.1202, the contract file shall indicate the basis for such determination.

(b) If the Contracting Officer determines a prospective contractor to be nonresponsible within the meaning of FPR 1-1.1202, the written determination to this effect shall be placed in the contract file. (See FPR 1-1.708 if a small business concern is involved.)

Subpart 9–1.13 Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals

§9–1.1300 Scope of subpart.

This subpart implements and supplements the policies applicable to the participation of Small Disadvantaged Business Concerns in Government procurement, at the prime and subcontract level, as set forth in FPR Subpart 1–1.13.

§9–1.1310 Subcontracting with small disadvantaged business concerns.

See §9–1.710 for guidance relative to subcontracting plans.

Subpart 9-1.16 Reports of Identical Bids

§9-1.1603 Reporting requirements.

§9-1.1603-3 Submission of reports.

Heads of Procuring Activities are responsible for submitting to the Office of the General Counsel two copies of identical bid reports.

Subpart 9-1.51 Considerations in Selecting Award Instrument - Procurement Contract, Grant, or Cooperative Agreement

§9-1.5100 Scope of subpart.

This subpart provides guidance on the appropriate use of award instruments consistent with the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. 95-224 and OMB implementation of this Act as published in the Federal Register August 18, 1978 (41 FR 36860).

§9-1.5101 Applicability.

This subpart applies to all program and individual transactions where the choice of award instruments is within the administrative discretion of DOE and is not otherwise proscribed or limited by law.

§9-1.5102 Selection criteria.

(a) A variety of award instruments is available as the means for defining the terms and conditions, and the nature of the relationship between DOE and eligible recipients. The award instruments are intended to be different in purpose, application, content, and nature. When properly employed, they create different relationships between the parties. Because of these differences, the decision to use a particular instrument to implement a particular purpose must be made deliberately. The determination of whether a program, to be implemented through individual transactions, is principally one of acquisition or assistance will be made at a DOE policy level. DOE Secretarial Officers will ensure that this determination is either made or reviewed at a policy level.

(b) Procurement contracts. A procurement contract shall be used as the legal instrument to reflect a relationship between the Federal Government and a state or local government or other recipient whenever (1) the principal purpose of the instrument is the acquisition by purchase, lease, or barter, of property, or services for the direct benefit or use of the Federal Government; or (2) whenever DOE determines in a specific instance that the use of a type of procurement contract is appropriate.

(c) Grants. A type of grant agreement shall be used as the legal instrument to reflect a relationship between the Federal Government and a state or local government or other recipient whenever the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the state or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and no substantial involvement is anticipated between DOE, acting for the Federal Government, and the state or local government or other recipient during performance of the contemplated activity.

(d) Cooperative agreements. A type of cooperative agreement shall be used as the legal instrument to reflect a relationship between the Federal Government and a state or local government or other recipient whenever the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the state or local government or other recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and substantial involvement is anticipated between DOE, acting for the Federal Government, and the state or local government or other recipient during performance of the contemplated activity.

(e) Any public notice, solicitation, or request for applications or proposals should indicate whether the intended relationship will be one of procurement or assistance and state that the applicable DOE procurement regulations will govern if a procurement contract is entered into and that the DOE Assistance Regulations (10 CFR II-600 et. seq.) will govern if a financial assistance instrument is utilized.

Subpart 9-1.52 (Reserved)

Subpart 9-1.53 (Reserved)

Subpart 9-1.54 Organizational Conflicts of Interest

§9-1.5401 Scope of subpart.

This subpart sets forth Department of Energy (the "Department") policies and procedures regarding organizational conflicts of interest (OCI) and is pursuant to section 644 of the Department of Energy Organization Act (Pub. L. 95-91) to implement the requirements of the Federal Nonnuclear Energy Research and Development Act of 1974 (Pub. L. 93-577), as amended, and the Federal Energy Administration Act of 1974 (Pub. L.93-275), as amended.

§9-1.5402 Policy.

It is the policy of the Department to identify and avoid or mitigate organizational conflicts of interest before entering into contracts, agreements, and other arrangements.

§9-1.5403 Definitions.

(a) The term "organizational conflicts of interest" means that a relationship or situation exists whereby an offeror or a contractor (including chief executives and directors, to the extent that they will or do become involved in the performance of the contract, and proposed consultants or subcontractors where they may be performing services similar to the services provided by the prime) has past, present, or currently planned interests that either directly or indirectly, through a client relationship, relate to the work to be performed under a Department contract and which (1) may diminish its capacity to give impartial, technically sound, objective assistance and advice, or (2) may result in it being given an unfair competitive advantage. It does not include the normal flow of benefits from the performance of the contract.

(b) The term "research and development" means any work or effort, the principal purpose of which involves (1) theoretical analysis, exploration, or experimentation; or (2) extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

(c) The term "evaluation services or activities" means any work or effort, the principal purpose of which involves the independent study of technology, process, product, or policy which entails the assessment, appraisal, or survey of such technology, process, product, or policy.

(d) The term "technical consulting and management support services" means any work or effort, the principal purpose of which is to provide internal assistance to any program element or other organizational component of the Department in the formulation or administration of its programs, projects, or policies, which requires the contractor to be given access to internal or proprietary data. Such services typically include assistance in the preparation of program plans; evaluation, monitoring or review of contractors' activities or proposals submitted by prospective contractors; preparation of preliminary designs, specifications, or statements of work.

(e) The term "architect-engineering services" means the work or effort of a professional nature associated with the study, test, design, supervision, and construction, alteration, or repair of real property including utilities and appurtenances thereto. Such services embrace conceptual design and Title I, Title II, and Title III work, as defined in §9-18.306-50(b).

(f) The term "contract" for purposes of implementing policy on organizational conflicts of interest, means any contract, agreement or other arrangement with the Department.

(g) The term "contractor" means any person, firm, unincorporated association, joint venture, partnership, corporation or affiliates thereof, which is a party to a contract with the Department.

(h) The term "affiliates" means business concerns which are affiliates of each other when either directly or indirectly one concern or individual controls or has the power to control another, or when a third party controls or has the power to control both. (See 41 CFR §1-1.601-1(e).)

(i) The term "subcontractor" means any subcontractor of any tier which performs work under a contract.

(j) The term "offeror" means any person, firm, unincorporated association, joint venture, partnership, corporation or affiliates thereof, submitting a bid or proposal, solicited or unsolicited, to the Department to obtain a contract or modification thereof.

§9-1.5404 Criteria for recognizing organizational conflicts of interest.

(a) General. Two questions should generally be asked in determining whether organizational conflicts of interest exist: (1) Are there conflicting roles which might bias a contractor's judgment in relation to its work for the Department? (2) Is the contractor being given an unfair competitive advantage based on the performance of the contract? The ultimate determination as to whether organizational conflicts of interest exist should be made in the light of common sense and good business judgment based upon the relevant facts and the work to be performed. While it is difficult to identify, and to prescribe in advance, a specific method for avoiding all the various situations or relationships which might involve potential organizational conflicts of interest, Department personnel must pay particular attention to proposed contractual requirements which call for the rendering of advice, or consultation or evaluation services, or similar activities that lay direct groundwork for the Department's decisions on future procurements, research and development programs, production and regulatory activities.

(b) Situations or relationships involving organizational conflicts of interest. The following general examples (which are not all-inclusive) illustrate situations or relationships where potential organizational conflicts of interest frequently arise. Specific examples are set forth in Appendix A.

(1) Contract performance involving the preparation and furnishing of complete or essentially complete specifications which are to be used in a competitive procurement for the furnishing of products or services.

(2) Contract performance involving the preparation and furnishing of a detailed plan for specific approaches or methodologies that are to be incorporated in a competitive procurement.

(3) Contract performance involving access to internal information not available to the public concerning Departmental plans or programs and related opinions, clarifications, interpretations and positions.

(4) Contract performance involving access to proprietary information which cannot lawfully be used for purposes other than those authorized by the owners.

(5) Contract performance involving evaluation of the contractor's products or services, or the products or services of another party, where the contractor is or has been substantially involved in their development or marketing.

(6) Contract performance involving the preparation and furnishing of advice to the Department in a technical area where the contractor is also providing consulting assistance in the same area to any other organization.

(7) Contract performance involving the preparation and furnishing of advice to the Department on a regulatory matter where the contractor is also providing assistance on the same or similar matter to any organization regulated by the Department.

(c) Other considerations. An organizational conflict of interest may exist or arise:

(1) Even though no follow-on procurement is anticipated;

(2) Even though a hardware exclusion clause may not be appropriate; and

(3) When a contract is awarded on a noncompetitive or a sole source basis.

(d) An organizational conflict of interest is more likely to be disclosed if a contract is competitive. Accordingly, greater care shall be exercised in the absence of competition.

§9-1.5405 Disclosure of organizational conflicts of interest.

(a) When submitting solicitations and unsolicited proposals for (1) evaluation services or activities; (2) technical consulting and management support services and professional services; (3) research and development conducted pursuant to the authority of the Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended; and (4) other contractual situations where special organizational conflicts of interest provisions are noted in the solicitation and included in the resulting contract, offerors shall be required to disclose relevant information bearing on the possible existence of any organizational conflicts of interest or complete the representation required by §9-1.5407. This requirement shall also apply to all modifications of contracts of the types noted above except those issued under the Changes clause. Where, however, a disclosure statement of the type required by the Organizational Conflicts of Interest Disclosure or Representation provision has previously been submitted with regard to the contract being modified, only an updating of such statement shall be required. Information submitted by offerors pursuant to the disclosure requirement shall be treated by the Department, to the extent permitted by law, as confidential information to be used solely for OCI purposes.

(b) When the Government finds that an organizational conflict of interest exists or may exist with respect to an offeror or contractor, no contract or contract modification award covered by §9-1.5407 shall be made until the organizational conflict of interest has been adequately avoided or mitigated, except as provided in §9-1.5409 below.

§9-1.5406 Notices and representations: action required of Contracting Officers.

The disclosure or representation required by §9-1.5407 is designed to alert the Contracting Officer to situations or relationships which may constitute either present or anticipated organizational conflicts of interest with respect to a particular offeror or contractor. However, this disclosure or representation may not identify a potential organizational conflict of interest involving a successful offeror that could affect the offeror's participation in subsequent procurements arising out of or related to work performed under a contract that results from the solicitation currently under consideration. Accordingly, whenever such potential conflicts are foreseeable by the Government, a special notice also shall be included in the solicitation informing offerors of the fact that such a potential conflict is foreseen and that a special contract clause designed to avoid or mitigate such conflict will be included in any resultant contract as required by §9-1. 5408-2.Such notice shall specify the proposed extent and duration of restrictions to be imposed with respect to participation in subsequent procurements. A fixed term of reasonable duration is measured by the time required to eliminate what would otherwise constitute an unfair competitive advantage. This is a variable; and in no event shall an exclusion be stated which is not related to a specific expiration date or an event certain. In the event a contractor, having performed on one contract, later seeks work that stems or may be deemed to stem directly from prior performance, such contractor shall not be precluded from proposing on follow-on work unless the prior contract contained an appropriate follow-on restriction.

§9-1.5407 Disclosure or representation.

The following disclosure or representation provision shall be included in all solicitations, scope modifications and unsolicited proposals for (a) evaluation services or activities; (b) technical consulting and management support services and professional services; (c) research and development conducted pursuant to the authority of the Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended; and (d) other contractual situations where special organizational conflicts of interest provisions are noted in the solicitation and included in the resulting contract. Appendix B contains a suggested format for the disclosure submission.

ORGANIZATIONAL CONFLICTS OF INTEREST DISCLOSURE OR REPRESENTATION

It is Department of Energy policy to avoid situations which place an offeror in a position where its judgment may be biased because of any past, present, or currently planned interest, financial or otherwise, the offeror may have which relates to the work to be performed pursuant to this solicitation or where the offeror's performance of such work may provide it with an unfair competitive advantage. (As used herein, "offeror" means the proposer or any of its affiliates or proposed consultants or subcontractors of any tier.) Therefore:

(a) The offeror shall provide a statement which describes in a concise manner all relevant facts concerning any past, present, or currently planned interest (financial, contractual, organizational, or otherwise) relating to the work to be performed hereunder and bearing on whether the offeror has a possible organizational conflict of interest with respect to (1) being able to render impartial, technically sound, and objective assistance or advice, or (2) being given an unfair competitive advantage. The offeror may also provide relevant facts that show how its organizational structure and/or management systems limit its knowledge of possible organizational conflicts of interest relating to other divisions or sections of the organization and how that structure or system would avoid or mitigate such organizational conflict.

(b) In the absence of any relevant interests referred to above, the offeror shall submit a statement certifying that to its best knowledge and belief no such facts exist relevant to possible organizational conflicts of interest. Proposed consultants and subcontractors are responsible for submitting information and may submit it directly to the Contracting Officer.

(c) The Department will review the statement submitted and may require additional relevant information from the offeror. All such information, and any other relevant information known to the Department, will be used to determine whether an award to the offeror may create an organizational conflict of interest. If such organizational conflict of interest is found to exist, the Department may (1) impose appropriate conditions which avoid such conflict, (2) disqualify the offeror, or (3) determine that it is otherwise in the best interests of the United States to contract with the offeror by including appropriate conditions mitigating such conflict in the contract awarded.

(d) The refusal to provide the disclosure or representation and any additional information as required shall result in disqualification of the offeror for award. The nondisclosure or misrepresentation of any relevant interest may also result in the disqualification of the offeror for award, or if such nondisclosure or misrepresentation is discovered after award, the resulting contract may be terminated for default. The offeror may also be disqualified from subsequent related Department contracts, and be subject to such other remedial action as may be permitted or provided by law or in the resulting contract. The attention of the offeror in complying with this provision is directed to 18 U.S.C. 1001.

(e) Depending on the nature of the contract activities, the offeror may, because of possible organizational conflicts of interest, propose to exclude specific kinds of work from the statement of work contained in a solicitation for a negotiated procurement, unless the solicitation specifically prohibits such exclusion. Any such proposed exclusion by an offeror shall be considered by the Department in the evaluation of proposals, and if the Department considers the proposed excluded work to be an essential or integral part of the required work, the proposal may be rejected as unacceptable.

(f) No award shall be made until the disclosure or representation has been evaluated by the Government. Failure to provide the disclosure or representation will be deemed to be a minor informality (FPR §1-2.405) and the offeror or contractor shall be required to promptly correct the omission.

§9–1.5408 Contract clauses.

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§9–1.5408–1 General contract clause.

Except where a special clause has been determined to be appropriate, all contracts subject to the disclosure or representation requirement of §9–1.5407 shall include the following clause:

ORGANIZATIONAL CONFLICTS OF INTEREST—GENERAL

(a) The contractor warrants that, to the best of its knowledge and belief, and except as otherwise disclosed, there are no relevant facts which could give rise to organizational conflicts of interest, as defined in 41 CFR §9–1.5403(a) or that the contractor has disclosed all relevant information.

(b) The contractor agrees that, if after award, an organizational conflict of interest with respect to this contract is discovered, an immediate and full disclosure in writing shall be made to the Contracting Officer which shall include a description of the action which the contractor has taken or proposes to take to avoid or mitigate such conflicts. The Department may, however, terminate the contract for its convenience if it deems such termination to be in the best interests of the Government.

(c) In the event that the contractor was aware of an organizational conflict of interest prior to the award of this contract and did not disclose the conflict to the Contracting Officer, the Government may terminate the contract for default.

(d) The provisions of this clause shall be included in all subcontracts for work to be performed similar to the services provided by the prime contractor, and the terms "contract," "contractor," and "Contracting Officer" modified appropriately to preserve the Government's rights.

§9–1.5408–2 Special contract clauses.

(a) If it is determined from the nature of the proposed contract that a potential organizational conflict of interest may exist, the Contracting Officer may determine that such conflict can be avoided through the use of an appropriate special contract clause. Examples of the types of clauses which may be employed include, but are not limited to, the following:

(1) Hardware exclusion clauses which prohibit the acceptance of production contracts following a related nonproduction contract previously performed by the contractor;

(2) Software exclusion clauses;

(3) Clauses which require the contractor (and/or certain of its key personnel) to avoid certain organizational conflicts of interest;

(4) Clauses which provide for the protection of the confidentiality of data and guard against its unauthorized use; and

(5) Clauses that prohibit other segments or divisions of the contractor from becoming involved in the performance of the contract work or being in a position to influence such work.

If deemed appropriate, the prospective contractor may be given the opportunity to negotiate the terms and conditions of the clause and its application including the extent and time period of any restrictions.

(b) Contracts for technical consulting and management support services, as defined in §9–1.5403(d), are particularly susceptible to organizational conflicts of interest. Therefore, the following contract clause shall be included in all contracts for technical consulting and management support services. This clause, after any appropriate modification, may also be included in any contract for professional services and evaluation services and activities:

ORGANIZATIONAL CONFLICTS OF INTEREST—SPECIAL CLAUSE

(a) Purpose. The primary purpose of this clause is to aid in ensuring that the contractor (1) is not biased because of its past, present, or currently planned interests (financial, contractual, organizational, or otherwise) which relate to the work under this contract, and (2) does not obtain any unfair competitive advantage over other parties by virtue of its performance of this contract.

(b) Scope. The restrictions described herein shall apply to performance or participation by the contractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as the "contractor") in the activities covered by this clause as a prime contractor, subcontractor, cosponsor, joint venturer, consultant, or in any similar capacity.

(1) Technical consulting and management support services.

(i) The contractor shall be ineligible to participate in any capacity in Department contracts, subcontracts, or proposals therefor (solicited or unsolicited) which stem directly from the contractor's performance of work under this contract. Furthermore, unless so directed in writing by the Contracting Officer, the Contractor shall not perform any technical consulting or management support services work under this contract on any of its products or services or the products or services of another firm if the contractor is or has been substantially involved in their development or marketing. Nothing in this subparagraph shall preclude the contractor from competing for follow-on contracts for technical consulting and management support services.

(ii) If the contractor under this contract prepares a complete or essentially complete statement of work or specifications to be used in competitive procurements, the contractor shall be ineligible to perform or participate in any capacity in any contractual effort which is based on such statement of work or specifications. The contractor shall not incorporate its products or services in such statement of work or specifications unless so directed in writing by the Contracting Officer, in which case the restriction in this subparagraph shall not apply.

(iii) Nothing in this paragraph shall preclude the contractor from offering or selling its standard commercial items to the Government.

(2) Access to and use of information.

(i) If the contractor, in the performance of this contract, obtains access to information, such as Department plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (Pub. L. 93-579), or data which has not been released or otherwise made available to the public, the contractor agrees that without prior written approval of the Contracting Officer it shall not: (a) use such information for any private purpose unless the information has been released or otherwise made available to the public; (b) compete for work for the Department based on such information for a period of six (6) months after either the completion of this contract or until such information is released or otherwise made available to the public, whichever is first; (c) submit an unsolicited proposal to the Government which is based on such information until one year after such information is released or otherwise made available to the public; and (d) release such information unless such information has previously been released or otherwise made available to the public by the Department.

(ii) In addition, the contractor agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (Pub. L. 93-579), or other confidential or privileged technical, business, or financial information under this contract, it shall treat such information in accordance with any restrictions imposed on such information.

(iii) The contractor shall have, subject to patent, data, and security provisions of this contract, the right to use technical data it first produces under this contract for its private purpose provided that, as of the date of such use, all reporting requirements of this contract have been met.

(c) Disclosure after award.

(1) The contractor agrees that if after award it discovers an organizational conflict of interest with respect to this contract, an immediate and full disclosure shall be made in writing to the Contracting Officer which shall include a description of the action which the contractor has taken or proposes to take to avoid or mitigate such conflicts. The Department may, however, terminate the contract for convenience if it deems such termination to be in the best interests of the Government.

(2) In the event that the contractor was aware of an organizational conflict of interest prior to the award of this contract and did not disclose the conflict to the Contracting Officer, the Department may terminate the contract for default.

(d) Subcontracts. (1) The contractor shall include this clause, including this paragraph, in subcontracts of any tier which involve performance or work of the type specified in (b)(1) above or access to information of the type covered in (b)(2) above. The terms "contract", "contractor" and "Contracting Officer" shall be appropriately modified to preserve the Government's rights.

(2) If a subcontract is to be issued for evaluation services or activities, technical consulting or management support services work as defined at § 9-1.5403(d), the contractor shall obtain for the Department a disclosure statement or representation, in accordance with DOE regulations in effect at the time, from each intended subcontractor or consultant. The contractor shall not enter into any subcontract nor engage any consultant unless the Contracting Officer shall have first notified the contractor that there is little or no likelihood that an organizational conflict of interest exists or that despite the existence of a conflict of interest the award is in the best interest of the Government.

(e) Remedies. For breach of any of the above restrictions or for nondisclosure or misrepresentation of any relevant facts required to be disclosed concerning this contract, the Government may terminate the contract for default, disqualify the contractor for subsequent related contractual efforts and pursue such other remedies as may be permitted by law or this contract.

(f) Waiver. Requests for waiver under this clause shall be directed in writing to the Contracting Officer and shall include a full description of the requested waiver and the reasons in support thereof. If it is determined to be in the best interests of the Government, the Contracting Officer shall grant such a waiver in writing.

§9-1.5409 Evaluation, findings, and contract award.

(a) The Contracting Officer or selection official, as appropriate, shall evaluate all relevant facts submitted by an offeror pursuant to the requirements of § 9-1.5407 and such other relevant information as may be available concerning possible organizational conflicts of interest. After evaluating all such information in accordance with the criteria' of § 9-1.5404 and prior to any award, a finding shall be made by the Contracting Officer whether possible organizational conflicts of interest exist with respect to a particular offeror or whether there is little or no likelihood that such conflicts exist. When formal source evaluation board procedures are applicable, the finding shall be made by the Source Selection Official. If the finding indicates that such conflicts exist, then the Contracting Officer shall:

(1) Disqualify the offeror from award; or

(2) Avoid such conflicts by the inclusion of appropriate conditions in the resulting contract; or

(3) If such conflicts cannot be avoided by an appropriate contract provision, and the Secretary or the Secretary's designee has nevertheless determined that award of the contract to the offeror is in the best interest of the United States, the contract may be awarded. Where such a public interest determination is made, an appropriate written finding and determination shall be published in the FEDERAL REGISTER and an appropriate clause included in the contract to mitigate the conflict, to the extent feasible, prior to any award.

(b) Examples of circumstances justifying the determination permitted by §9-1.5409(a)(3) include, but are not limited to:

(1) Situations where the public exigency will not otherwise permit; and

(2) Situations where the work or services cannot otherwise be obtained.

§9-1.5410 Action in lieu of termination.

If, after award, a possible organizational conflict of interest is identified by the contractor or other sources and the Contracting Officer determines that such a conflict does in fact exist and that it would not be in the best interests of the Government to terminate the contract as provided in the clauses required by §9-1.5408, the Contracting Officer shall take every reasonable action to avoid or mitigate the effects of the conflict.

§9-1.5411 DOE management contractors, subcontractors and consultants.

The missions and functions of the Department require the use of contractors to operate and manage the Department's facilities on a long-term basis pursuant to Part 9-50. Where such an operating contract is to be renewed, the Contracting Officer should exercise special care in incorporating an appropriate organizational conflict of interest provision therein. Whenever an operating contract is not to be renewed, but a new selection is to be made, the disclosure or representation requirement of §9-1.5407 and an appropriate clause should be included in the solicitation and resulting contract. In preparing such clause, the Contracting Officer shall consider provisions which assure appropriate restraints on intercorporate relations between the contractor's organization and personnel operating the Department's facility and its parent corporate body and affiliates, including personnel access to the facility, technical transfer of information from the facility, and the availability from the facility of other advantages flowing from performance of the contract. The subcontractors and consultants of Department Operating Contractors should be, to the extent feasible, made subject to the requirements of this subpart as if they were performing the work as prime contractors to the Department.

§9-1.5412 Architect-engineering and construction contracts.

(a) The award of related architect-engineering services and construction contracts or subcontracts to the same contractor can result in self-inspection of construction work and permit the contractor to render biased decisions. Such contract awards shall not be permitted unless a waiver is obtained prior to award from the Department's Senior Procurement Official.

(b) The award of architect-engineering services contracts, the principal purpose of which is to provide evaluation services and activities or technical consulting and management support services, shall be subject to the requirements of §9-1.5407 and §9-1.5408-2(b).

§9-1.5413 Subcontractors and consultants.

The Contracting Officer shall require offerors and contractors to obtain for the Department a disclosure or representation in accordance with subsection 9-1.5407 from subcontractors and consultants who may be performing services similar to the services provided by the prime, except that subcontractors shall not normally be required to submit the disclosure or representation if such subcontract is for supplies. Such disclosure or representation may be submitted by the subcontractors and consultants directly to the Contracting Officer and they shall be treated by the Department, to the extent permitted by law, as confidential information to be used solely for OCI purposes. The Contracting Officer shall assure that contract clauses in accordance with §9-1.5408 are included in subcontracts or consultant agreements involving performance of work under a prime contract covered by this subpart.

§9-1.5414 Remedies.

In addition to such other remedies as may be permitted by law or contract, for a breach of any of the restrictions in this subpart or for nondisclosure or misrepresentation of any relevant facts required to be disclosed by this subpart, the Department may disqualify the contractor for subsequent Department contracts. Contractors and offerors may also be subject to the criminal penalties expressed in 18 U.S.C. §1001 for such violations.

APPENDIX A

Examples of Contractual Situations or Relationships—Organizational Conflicts of Interest

GENERAL

In development work it is normal to select firms which have done the most advanced work in the field. It is to be expected that these firms will design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than can firms which did not participate in the development, and this affects the time and quality of production, both of which are important to the Government. In many instances the Government may have financed such development. Thus, the development contractor may have an unavoidable competitive advantage which is not considered unfair and no prohibition should be imposed.

EXAMPLES

The following examples illustrate types of situations and relationships where organizational conflict of interest questions frequently arise, but they are not all-inclusive.

Example 1

Contractor A, in connection with the performance of a study contract, is given information by the Department regarding Department plans for future procurements. This information is not available to interested industrial firms.

Guidance. Normally this would constitute an OCI and the contractor should not be permitted to compete with such firms for work relating to such plans.

Example 2

Company A, in response to a request for proposals (RFP), proposed to undertake certain analyses of an energy savings device as called for in the RFP. The company is one of several companies considered to be technically well qualified. In response to the inquiry in the RFP, A advises that it is currently performing similar analyses for the manufacturer of the device.

Guidance. Normally this would constitute an OCI and a contract for that particular work would not be awarded to Company A because it would be placed in a position in which its judgment could be biased in relationship to its work for the Department. Since there are other well qualified companies available, there would be no reason for granting a waiver of the policy.

Example 3

Accounting Firm A, in response to a request for proposal, proposes to undertake an analysis of the profitability of one segment of the energy industry. The firm is one of several firms considered to be technically well qualified. In response to the inquiry in the RFP, A advises that it derives a substantial portion of its income from the industry to be studied.

Guidance. Normally this would constitute an OCI and a contract would not be awarded to Firm A because it would be placed in a position in which its judgment could be biased in relationship to its work for the Department.

Example 4

Company A prepares updated Government specifications for a standard refrigerator to be procured competitively.

Guidance. Normally this would constitute an OCI and Company A shall not be allowed for a reasonable period of time to compete for supply of the refrigerator.

Example 5

Company A designs or develops new electronics equipment and, as a result of the design or development, prepares specifications.

Guidance. Normally this would not constitute an OCI and the company may supply the electronics equipment.

Example 6

A tool company and/or a machinery company representing the American Tool Institute works under the supervision and control of Government representatives to refine specifications or to clarify the requirements of a specific procurement.

Guidance. Normally this would not constitute an OCI and these companies may supply the item.

Example 7

Prior to procurement of Automatic Data Processing (ADP) Equipment, Company A is awarded a contract to develop software to automate a DOE function. Since the software can be written to favor a particular vendor's commercial ADP hardware, a potential conflict of interest exists.

Guidance. Normally this would constitute an OCI and Company A should be barred from at least the initial follow-on ADP hardware procurement using the software developed under its development contract.

Example 8

Company A receives a contract to define the detailed performance characteristics a Government agency will require for the purchase of rocket fuels. A has not developed the particular fuels. At the time the contract is awarded, it is clear to both parties that the performance characteristics arrived at will be used by the Government agency to choose competitively a contractor to develop or produce the fuels.

Guidance. Normally this would constitute an OCI and Company A shall not be permitted to bid on this procurement.

Example 9

Company A receives a contract to prepare a detailed plan for the procurement of services aimed at the advanced scientific and engineering training of the Department's personnel. It suggests a curriculum which the agency endorses and incorporates in requests for proposals to various institutions to establish and conduct such training.

Guidance. Normally this would constitute an OCI and Company A shall not be permitted to bid on this procurement.

Example 10

Consulting Firm A, in response to an RFP, proposes to undertake an evaluation of the environmental impacts of coal-fired power plants as called for in the RFP. The company is one of several companies considered to be technically well qualified. In response to the inquiry in the RFP, A advises that it derives a substantial portion of its income from companies which manufacture nuclear power plants.

Guidance. Normally this would constitute an OCI and a contract for that particular work would not be awarded to Firm A because it would be placed in a position in which its judgment could be biased in relationship to its work for the Department.

Example 11

Consulting Firm A derives a substantial portion of its income from Company B in connection with the study of natural gas production. Company B is also heavily involved with motor gasoline marketing. A discloses these facts in response to an RFP for a study of motor gas marketing.

Guidance. Normally this would constitute an OCI and a contract for the study of motor gasoline marketing plants would not be awarded to Firm A because it would be placed in a position in which its judgment could be biased in relation to its work for the Department.

APPENDIX B

DISCLOSURE FORMAT

With respect to past, present, and currently planned interests (financial, contractual, organizational, or otherwise), the offeror should furnish a list of past, present, and currently planned activities (including contracts) which relate to the work to be performed under the solicitation. The list may be in columnar format showing:

(a) The company (or agency) for which the work is being, has been, or will be performed;

(b) Nature of the work (a brief description);

(c) Period of performance for the work;

(d) Dollar value of the work; and

(e) Sales and marketing activity.

Similar information should be provided by the covered subcontractors and consultants relating to the work to be performed by them under the solicitation.

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PART 9-2 PROCUREMENT BY FORMAL ADVERTISING

§9-2.000 Scope of part.

This part implements and supplements FPR Part 1-2.

Subpart 9-2.1 Use of Formal Advertising.

§9-2.106 Procurement Management Assistance Review.

The Director, Procurement and Assistance Management, is responsible for establishing and maintaining a procurement management assistance review program.

Subpart 9-2.2 Solicitation of Bids

§9-2.201 Preparation of invitations for bids.

When an option is to be employed, the option quantity should be for an amount which bears a reasonable relationship to the initial firm quantity amount. For procedures to be used in setting the option quantity, see §9-1.5303.

§9-2.203-3 Publicity in newspapers and trade journals.

(b) When it is deemed necessary to use paid advertisements in newspapers and trade journals, written authority for such publication shall be obtained from the Head of the Procuring Activity or designee.

Subpart 9-2.4 Opening of Bids and Award of Contract

§9-2.401 Receipt and safeguarding of bids.

Envelopes, or other outer covering, containing identified bids shall be time-stamped (indicating the place, date, and time of receipt) upon receipt, either in a mail room or other receiving point at the address specified in the invitation.

§9-2.402 Opening of bids.

At the bid opening, the relative merits of any bid shall not be discussed by the person opening the bids or the Contracting Officer, with the bidders, their representatives, or with casual observers. No statements shall be issued by the bid opener or the Contracting Officer at a bid opening bearing on the award, the possibility of a readvertisement, mistakes in bids, etc. No oral instructions shall be given to bidders at any time during the opening. Protests of bidders and inquiries regarding the award of contract shall be referred to the Head of the Procuring Activity or designee after the completion of the bid opening procedure.

§9-2.406 Mistakes in bids.

§9-2.406-3 Other mistakes disclosed before award.

Pursuant to FPR 1-2.406-3(b), the Senior Procurement Official, Headquarters, has been delegated authority by the Secretary to make the determinations under FPR 1-2.406-3. In the case of mistakes in bids alleged after opening of bids and before award, the Senior Procurement Official, Headquarters, has the power to redelegate this authority to Heads of Procuring Activities without power of redelegation, to make administrative determinations regarding withdrawal of bids as provided for in paragraphs (a)(1) and (3) of FPR 1-2.406-3, providing that each such determination shall be approved by Legal Counsel.

§9-2.406-4 Disclosure of mistakes after award.

The Senior Procurement Official, Headquarters, has been delegated authority to make the determinations under FPR 1-2.406-4. Mistakes in bids after award, together with the data set forth in FPR 1-2.406-4(f),shall be submitted to the Senior Procurement Official, Headquarters.

§9-2.407 Award.

§9-2.407-8 Protests against award.

(b) Protests before award.

(3) The Head of the Procuring Activity or designee shall obtain approval of the Senior Procurement Official, Headquarters, to make an award where a protest has been submitted to either the DOE or to the Comptroller General.

Subpart 9-2.5 Two-Step Formal Advertising

§9-2.502 Conditions for use.

Use of the two-step formal advertising method shall be approved by the HPA. The Contracting Officer shall submit a written request for approval justifying its use in accordance with FPR 1-2.502.

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PART 9-3 PROCUREMENT BY NEGOTIATION

§9-3.000 Scope of part.

This part implements and supplements the policies and procedures governing procurement by negotiation set forth in FPR Part 1-3.

Subpart 9-3.1 Use of Negotiation

§9-3.102 Factors to be considered in negotiated contracts.

In addition to other factors to be considered in FPR 1-3.102, the Contracting Officer must inquire of, and secure complete information from, the prospective contractor as to background patent applications and patents in order that a determination regarding need for a "background patents" provision can be made.

§9-3.103 Dissemination of procurement information.

See 10 CFR Part 709, Public Records, for regulations relating to the availability of DOE records to the public.

§9-3.150 Proposal information.

§9-3.150-1 General.

Information contained in proposals will be used only for evaluation purposes except to the extent such information is generally available to the public, is already the property of the Government, or the Government already has unrestricted use rights, or is or has been made available to the Government from any source, including the proposer or offeror, without restriction. The term "proposals," as used in this section, includes responses to program opportunity notices (PONs), program research and development announcements (PRDAs)and solicitations of a similar nature, in addition to requests for proposals (RFPs) and unsolicited proposals. As a practical matter, DOE cannot assume any responsibility for disclosure or use of any such information unless it is identified by the proposer or offeror in accordance with this section. Unless a solicitation specifies otherwise, DOE will not refuse to consider a solicited proposal or an unsolicited proposal merely because the proposal is restrictively marked.

§9-3.150-2 Treatment of proposal information.

(a) A proposal may include technical data and other data, including trade secrets and/or privileged or confidential commercial or financial information, which the proposer does not want disclosed to the public or used by the Government for any purpose other than proposal evaluation. To protect such data the proposer should specifically identify each page including each line or paragraph thereof containing the data to be protected and mark the cover sheet of the proposal with the notice set forth immediately below. Solicitation documents shall include instructions to proposers to mark their proposals in this manner:

NOTICE

> The data contained in pages __________ of this proposal have been submitted in confidence and contain trade secrets or proprietary information, and such data shall be used or disclosed only for evaluation purposes, provided that if a contract is awarded to this proposer as a result of or in connection with the submission of this proposal, the Government shall have the right to use or disclose the data herein to the extent provided in the contract. This restriction does not limit the Government's right to use or disclose data obtained without restriction from any source, including the proposer.

Reference to this notice on the cover sheet should be placed on each page to which the notice applies. Data, or abstracts of data, marked with this notice will be retained in confidence and used by DOE or its designated representative(s), including Government contractors and consultants, as set forth in §9-3.150-4, below, solely for the purpose of evaluating the proposal. The data so marked will not otherwise be disclosed or used without the proposer's prior written permission except to the extent provided in any resulting contract, or to the extent required by law. Proposers should be aware of the provisions of §9-3.150-4 if they desire to modify the above notice or otherwise seek to limit the evaluation to the Government only. The restriction contained in the notice does not limit the Government's right to use or disclose any data contained in the proposal if it is obtainable from any source, including the proposer, without restriction. Although it is policy to treat all proposals as confidential, the Government assumes no liability for disclosure or use of unmarked data and may use or disclose such data for any purpose. See FPR 1-3.103(b) regarding disclosure to other offerors.

(b) Should a contract be awarded based on a proposal, it is DOE policy, in consideration of the award, to obtain unlimited rights for the Government in the technical data contained in the proposal unless the prospective contractor marks those portions of the technical information which he asserts as "proprietary data", or specifies those portions of such technical data which are not directly related to or will not be utilized in the work to be funded under the contract. "Proprietary data" is defined in §9-9.201(b). A proposer who receives a contract award shall mark the data identified as proprietary by specifying the appropriate page numbers to be inserted in the Rights to Proposal Data clause of paragraph (c) below, which clause shall be inserted in the contract. Subject to the concurrence of the Contracting Officer, information unrelated to the contract may be deleted from the proposal by the contractor. The responsibility, however, of identifying technical data as proprietary or deleting it as unrelated, rests with the prospective contractor.

(c) The following clause shall be included in any contract based on a proposal. This clause is intended to apply only to technical data and not to other data such as privileged or confidential commercial or financial information.

RIGHTS TO PROPOSAL DATA

> Except for technical data contained on pages __________ of the contractor's proposal dated __________ which are asserted by the contractor as being proprietary data, it is agreed that, as a condition of the award of this contract, and notwithstanding the provisions of any notice appearing on the proposal, the Government shall have the right to use, duplicate, disclose and have others do so for any purpose whatsoever, the technical data contained in the proposal upon which this contract is based.

§9-3.150-3 Handling notice.

In order that proposals may be handled in confidence consistent with the policies set forth in this section, the following notice shall be affixed to a cover sheet attached to each proposal upon receipt by DOE. Use of the notice neither alters any obligation of the Government, nor diminishes any rights in the Government to use or disclose data or information.

NOTICE FOR HANDLING PROPOSALS

> This proposal shall be used or duplicated only for DOE evaluation purposes, and this notice shall be affixed to any reproduction or abstract thereof. Disclosure of this proposal outside the Government for DOE evaluation purposes shall not be made unless the provisions of §9-3.150-4 are followed. The restrictions contained in this notice do not apply to any data or commercial or financial information contained in this proposal if it is already generally available to the public, is already available to the Government on an unrestricted basis or is the property of the Government, or is or becomes available from any source, including the proposer, without restriction.

§9-3.150-4 Disclosure outside Government.

(a) Policy.

It is DOE policy to have proposals evaluated by the most competent persons available in Government. In addition, DOE frequently meets its evaluation needs by having proposals reviewed by evaluators and contractor organizations operating or managing government-owned facilities. Outside evaluations may be made provided the requirements in (b) and (c) below are met. A decision to employ outside evaluators shall take into consideration requirements for avoidance of organizational conflicts of interest set forth in §9-1.54 and the competitive relationship, if any, between the proposer and the prospective outside evaluator.

(b) Approval.

Decisions to evaluate proposals outside the government shall be made by the Source Selection Official with the concurrence of the Senior Procurement Official, Headquarters, for all source evaluation board procurements, or by the Senior Program Official or designee with the concurrence of the HPA or his designee for other procurements. If the proposal under consideration expressly indicates that only Government evaluation is authorized and evaluation outside the Government is nevertheless desired, the proposer should be advised that DOE may be unable to give full consideration to the proposal unless the proposer consents in writing to having the proposal evaluated outside the Government.

(c) Agreement with evaluator.

Where it is determined to evaluate a proposal outside the Government, such as by consultants, grantees and contractors including those who operate or manage Government-owned facilities, the following agreement or an equivalent arrangement for the treatment of the proposal shall be obtained from the outside evaluator before DOE furnishes a copy of the proposal to such person. In addition, care should be taken that the handling notice required by §9-3.150-3 is affixed to a cover sheet attached to the proposal before it is disclosed to the evaluator.

CONDITIONS FOR EVALUATING PROPOSALS

> Whenever DOE furnishes a proposal for evaluation, the recipient agrees to use the information contained in the proposal only for DOE evaluation purposes and to treat the information obtained in confidence. This requirement does not apply to information obtained from any source, including the proposer, without restriction. Any notice or restriction placed on the proposal by either DOE or the originator of the proposal shall be conspicuously affixed to any reproduction or abstract thereof and its provisions strictly complied with. Upon completion of the evaluation, the recipient shall return all copies of the proposal and abstracts, if any, to the DOE office which initially furnished the proposal for evaluation. Unless authorized by the DOE initiating office, the recipient shall not contact the originator of the proposal concerning any aspect of its contents.

§9-3.150-5 Debriefings to unsuccessful offerors.

Upon written request, unsuccessful offerors (those eliminated from competition at earlier stages, as well as those in contention up to the final selection) will be accorded formal debriefings. Such debriefings must be requested within 10 working days of receipt of notification of elimination from consideration or announcement of selection. Debriefings will be provided at the earliest feasible time, which normally shall be after announcement of the selection decision and prior to award of the contract. However, when the exigency of the situation will not permit delaying the award in order to debrief unsuccessful offerors, such debriefing may be conducted after award of the contract.

§9-3.151 Identification of proprietary data in proposals.

§9-3.151-1 Solicited proposals (including PONs and PRDAs).

Even though the statement of work contained in a solicitation sets forth the known requirements for technical data, i.e., technical data which will be specified to be delivered, there is no assurance that the contractor will deliver all of this data because paragraph (e) of the Rights in Technical Data (long form) clause of §9-9.202-3 (e)(2) permits the contractor to withhold proprietary data from delivery. In order to ascertain the technical data each proposer intends to actually withhold as proprietary data, and as an aid in determining whether to include the provision for limited rights in proprietary data set forth in optional paragraph (g) of the Rights in Technical Data (long form) clause, the provision set forth in §9-3.151-2 shall be included in the solicitation. This provision explains that solicitations will include DOE's known requirements for technical data, and that the proposer must submit a list identifying to the best of its knowledge which of this data will be withheld as proprietary data, or state that no technical data will be withheld. The submission of such list does not constitute a stipulation or determination by the Government that the data identified therein are in fact proprietary. In addition, the provision to be included in the solicitation refers to the Additional Technical Data Requirements clause, §9-9.202-3(c), as being included in the proposed contract where, due to programmatic considerations, it is contemplated that all of the requirements for technical data will not be known at the time of contracting. When a proposer specifically identifies the proprietary data to be withheld, the Contracting Officer shall, as advised by the appropriate program manager, determine whether:

(a) the Government needs limited rights in the proprietary data, in which case the optional paragraph (g) will be included in the Rights in Technical Data (long form) clause;

(b) the Government needs the right to require the contractor to license proprietary data to the Government and responsible third parties, in which case optional paragraph (h) will be included in the Rights in Technical Data (long form) clause; and

(c) the Government needs unlimited rights in the proprietary data, in which case negotiations may be held to purchase or obtain a suitable license in the proprietary data.

§9-3.151-2 Solicitations.

The following provision shall normally be included in solicitations which may result in contracts calling for research, development, or demonstration work or contracts for supplies in which delivery of required technical data is contemplated.

> The section of this solicitation which describes the work to be performed also sets forth DOE's known requirements for technical data. The Additional Technical Data Requirements clause, if included in this solicitation, provides the Government with the option to order additional technical data, the requirements for which are not known at the time of contracting. There is, however, a built-in limitation on the kind of technical data which may be required. This limitation clause provides that the contractor may withhold delivery of proprietary data. Accordingly, it is necessary that your proposal state that the work to be performed and the known requirements for technical data as set forth in the solicitation have been reviewed, and either state

> that, to the best of your knowledge, no data will be withheld, or submit a list identifying the proprietary data which, to the best of your knowledge, will likely be used in the contract performance and will be withheld.

§9-3.151-3 Unsolicited proposals.

The Contracting Officer, during contract negotiations, shall identify technical data which will be required to be furnished under the contract. In such instance, the proposer shall be required to submit a list identifying, to the best of his knowledge, which of this data will be withheld as proprietary under paragraph (e) of the Rights in Technical Data (long form) clause, or to state that no technical data will be withheld. The Contracting Officer shall then make the determinations, in the same manner as set forth in §9-3.151-1 above for solicited proposals, pertaining to the proprietary data identified to be withheld.

§9-3.152 Required notice of right to request patent waiver.

As set forth in §9-9.107-4(a)(6), offerors and prospective contractors are to be provided with notice of the right to request, in advance of or within 30 days after the effective date of contracting, a waiver of all or any part of the rights of the United States with respect to subject inventions. In no event will the fact that an offeror has requested such a waiver be a consideration in the evaluation of his offer or the determination of his acceptability. Accordingly, the following notice shall be given to all prospective contractors and shall be inserted in all solicitations which may result in contracts calling for research, development, or demonstration work:

> Offerors and prospective contractors, in accordance with applicable statutes and DOE Procurement Regulations, have the right to request, in advance of or within 30 days after the effective date of contracting, a waiver of all or any part of the rights of the United States in subject inventions.

Subpart 9-3.2 Circumstances Permitting Negotiation

§9-3.200 Scope of subpart.

(a) Section 302(c) of the Federal Property and Administrative Services Act of 1949, as amended, authorizes the negotiation of contracts, and is applicable to AEC (now DOE) procurement. Section 302(c)(15) of the Federal Property & Administrative Service Act of 1949, as amended, permits negotiation when otherwise authorized by law, provided that in such event the requirements of that Act shall apply. Accordingly, when the Federal Property and Administrative Services Act of 1949, as amended, or the Atomic Energy Act of 1954, as amended, or other law is used as the basis for negotiation, the requirements of section 304 of the Federal Property and Administrative Services Act of 1949, as amended, are applicable, except as provided in these regulations.

(b) Contracts to support industrial mobilization plans may be negotiated under section 302(c)(1) of the Federal Property and Administrative Services Act of 1949, as amended, or section 302(c)(15) of that Act and the Atomic Energy Act of 1954, as amended, if the requisite circumstances exist and the required findings and determinations can be made.

§9-3.202 Public exigency.

This exception may be applicable where a facility must be altered or repaired immediately in order not to interfere with essential production and the need for the work could not have been reasonably foreseen.

§9-3.204 Personal or professional services.

(c) Formal advertising procedures shall not be used for contracts for architect-engineer or other professional engineering services. Such contracts may be negotiated under section 302(c)(4) of the Federal Property and Administrative Services Act of 1949, as amended, or section 302(c)(15) of that Act and the Atomic Energy Act of 1954, as amended. However, the exemption provided for in §9-3.405-5(b) does not apply to contracts negotiated under section 302(c)(4) of the Federal Property and Administrative Services Act of 1949, as amended. Professional architect-engineer services shall be negotiated in accordance with §9-4.10 and FPR 1-4.10.

(d) Surveying, mapping, and field or laboratory tests of construction workmanship and materials and equipment should be classified as professional services when they clearly require planning, direction, supervision, or interpretation by professional engineers as a condition of performance, or when the contractor will be required to assume responsibility for the professional adequacy and accuracy of results. Depending upon the nature and requirements of a particular contract, professional engineering services may involve activities such as the following:

(1) Overall direction of the technical work;

(2) Supervision of work performed by technicians, sub-professionals, or nonprofessional employees;

(3) Determination of the methods or procedures for accomplishing the requirements of the contract;

(4) Interpretation of the methods or procedures for accomplishing the requirements of the contract; and

(5) Direct performance of required professional services.

(e) When the services are such that the planning and execution can be performed by personnel having only a practical knowledge of the use of instruments and techniques, such as routine aerial photographing and testing, and do not require any professional engineering competence or judgment, the "personal or professional services" exception to the formal advertising requirement is not applicable.

(f) Surveying, mapping, and testing services.

In 1959, the American Society of Civil Engineers (ASCE) adopted a policy statement that land surveying, engineering surveying, geodetic surveying, and cartographic surveying, commonly designated as surveying and mapping, are a part of the civil engineering profession. The report of the ASCE Task Committee on Status of Surveying and Mapping may be used for guidance in determining which positions should be considered as professional and which should be considered subprofessional.

§9-3.213 Technical equipment requiring standardization and interchangeability of parts.

If section 302(c)(13) of the Federal Property and Administrative Services Act of 1949, as amended, and the Atomic Energy Act of 1954, as amended, are used as the bases for negotiation, the example of determinations and findings set forth in FPR 1-3.213(e)(2) shall be appropriately modified to state the authority for negotiations.

§9-3.215 Otherwise authorized by law.

(a) The Atomic Energy Act of 1954, as amended, and the Atomic Energy Community Act of 1955, as amended, contain various exemptions from section 3709 of the Revised Statutes, as amended. Pursuant to section 310 of the Federal Property and Administrative Services Act of 1949, as amended, these references to section 3709 shall be construed to authorize procurement pursuant to section 302(c)(15) of the Federal Property and Administrative Services Act of 1949, as amended, without regard to the advertising requirements of sections 302(c) and 303 of that Act. The situations enumerated in FPR 1-3.201 through 1-3.214 are illustrative of situations which could support a determination and finding under the Atomic Energy Act of 1954, as amended, that advertising is not reasonably practicable or, as appropriate, that negotiation is necessary in the interest of common defense and security.

(b) The Atomic Energy Act of 1954, as amended, also provides in section 162 that the President may, in advance, exempt any specific action of Department of Energy in a particular matter carried out under the authority of the Atomic Energy Act of 1954, as amended, from the provisions of law relating to contracts whenever he determines that such action is essential in interest of common defense and security.

(c) Every contract negotiated under the authority of section 302(c)(15) of the Federal Property and Administrative Services Act of 1949, as amended, and the Atomic Energy Act of 1954, as amended, shall be supported by a determination and finding justifying use of such authority.

Subpart 9-3.3 Determinations, Findings, and Authorities

§9-3.301 General.

Except as otherwise provided in §9-3.302, the determinations and findings required by FPR Subpart 1-3.3 shall be made. Except as otherwise provided in §9-3.303, the determinations and findings required by FPR Subpart 1-3.3 may be made and executed by Contracting Officers, or by DOE Headquarters officials that have been delegated authority to select contractors.

§9-3.302 Determinations and findings required.

The determination and findings required by FPR 1-3.302(d) is not required when the contract is negotiated under the Atomic Energy Act of 1954, as amended.

§9-3.303 Determinations and findings by the Head of the Agency.

Determinations and findings supporting negotiation under the authority of the Federal Property and Administrative Services Act of 1949, section 302(c)(11) (FPR 1-3.211), with respect to contracts which will not require the expenditure of more than $25,000 may be executed by the senior procurement official, Headquarters. Determinations and findings for contracts in excess of $25,000 negotiated pursuant to section 302(c)(11), and in support of all contracts negotiated pursuant to sections 302(c)(12) and 302(c)(13) of the Federal Property and Adminstrative Services Act of 1949, as amended (FPR 1-3.212 & 1-3.213), shall be executed by the Head of the Agency.

Subpart 9-3.4 Types of Contracts

§9-3.404 Fixed-Price Contracts

§9-3.404-50 Lump-sum contract for architect-engineer services with reimbursement for certain costs.

(a) (Reserved)

(b) Description. This type of contract normally provides for a fixed amount or lump sum for the A-E services (see §9-18.306-50(b)(1) for definition of these services) plus reimbursement of, or payment of an additional lump sum for certain costs to the extent they are incurred in connection with the work and are approved by the Contracting Officer. These costs generally are not susceptible of reasonable estimation in advance due to a wide variation in the extent the related services are required for various projects, or they are for services not normally a part of titles I, II, and III.

(c) Compensation is included in the lump sum derived from the fee schedule in the contract for: all drawings, plans, and documents prepared and reproduced under title I, except those which are reimbursable in conjunction with field surveys and subsurface investigations; all drawings, specifications, invitations for bid, and other related documents prepared and reproduced under title II, prior to approval of title II design by DOE; and, preparation of reproducible copies and furnishing the specified number of copies of such drawings and documents after approval by DOE; and for reproducible "as-built" record drawings and marked-up "as-built" specifications prepared under title III (including updated master linen tracings, or reproducible linen tracings from the master set, if so specified in the contract). The provisions of the applicable Government Printing and Binding Regulations must also be observed.

(d) Where the contractor's responsible supervising representative, or an officer, proprietor, executive, or administrative head of the contractor participates directly in the performance of any of the services, he may be compensated for the time actually so engaged. The rate of compensation, including the allocation of home office expenses, if any, shall be subject to approval by the Contracting Officer and commensurate with the cost of employing another qualified person to do such work, but the salary portion should not exceed the actual salary rate of the individual concerned.

(e) The costs listed in paragraphs (b) and (d) of this section cover services that are normal to complete titles I, II, and III services. No profit should be included in the additional compensation for those services because the architect-engineer's profit for the service is included in the lump-sum amount determined from the fee schedule. In order to ensure adequate technical services, they may be paid for on an actual cost basis. However, if it is considered to be more advantageous to the Government, an additional lump sum should be negotiated to cover the costs; in the case of personal services such as inspectors, a daily rate may be negotiated. The calculation of the additional lump sum, or daily rate, should show clearly the amount allowed for each of the services or elements of cost.

(f) Services may be furnished by DOE instead of reimbursing the contractor for the expenses. The type of services that will be furnished should be stated in the contract.

(g) If services are furnished that are beyond titles I, II, and III, such as developmental work, special engineering studies, and the preparation of special documents such as operating and maintenance manuals, additional compensation, including profit, should be paid for such services. Note that preliminary proposals and construction completion reports normally are considered as part of titles I and III.

(h) Use of lump-sum contract.

(1) A lump-sum contract for architect-engineer services should be used wherever it is practicable to compile, in advance of the preparation of plans and specifications, adequate information specifically describing the character and extent of services required.

(2) When there is insufficient scope information available to permit contracting for complete services (titles I, II, and III) on a lump-sum basis, and when it may be to the advantage of the Government to do so, consideration should be given to contracting only for a study contract or for the preliminary engineering (title I), on either a reimbursable or lump-sum basis, in order to permit entering into a lump-sum contract for the remaining portion of architect-engineer services (titles II and III), based upon information developed in the first phase.

(3) Refer to §9-3.808-2 in determining profit or fee.

§9-3.405 Cost-Reimbursement Type Contracts

§9-3.405-5 Cost-plus-a-fixed-fee contract.

(a) The authority to determine under FPR 1-3.405-5(d)(1)(ix) that the application of the policy of limiting interim payments on cost-reimbursement type contracts to 80 percent of costs incurred would impose undue hardship on the contractor or adversely affect the interests of the Government, is delegated to the Heads of Procuring Activities.

(b) Pursuant to section 602(d)(13) and (20) of the Federal Property and Administrative Services Act of 1949, as amended, the 10 and 6 per centum cost and fee restrictions on contracts for architect-engineer services are not applicable to those former AEC functions, as well as those of the Bonneville Power Administration, now being performed by DOE.

§9-3.405-50 Cost-plus-award-fee (CPAF) contract.

(a) Description.

(1) The CPAF contract is a cost-reimbursement type contract with special fee provisions. It provides a means of applying incentives in contracts which are not susceptible to finite measurements of performance essential to structured incentive contracts. The fee established in a CPAF contract consists of two parts: (i) a fixed amount (base fee) which does not vary with performance and which could be zero; and (ii) an award amount (award fee), in addition to the fixed amount, sufficient to encourage attainment of excellent contract performance in stated areas such as quality, timeliness, ingenuity, and cost effectiveness. Award fee may be earned by the contractor in whole or in part. The amount of award fee to be paid is determined after a subjective evaluation by the Government of the contractor's performance, judged against performance criteria established by the Government and furnished in writing to the contractor.

(2) The number and kinds of performance goals and performance evaluation criteria used will differ widely from one contract to another. Therefore, when determining performance goals, criteria and rating plans, the contracting activity should select the plan which will motivate the contractor in a positive way to exceptional performance in specific areas. Evaluation reports will be prepared by the Government and results should be communicated to the contractor. Additionally, the contractor may be asked to provide an assessment of its performance in relation to each performance evaluation criterion. The decision that all or part of the award fee has been earned is a unilateral determination made by a fee determination official, not subject to the Disputes clause of the contract.

(b) Application. The CPAF contract is suitable for use when:

(1) A cost-reimbursement type contract is found necessary;

(2) The work to be performed is such that specific quantitative or objective measurement is not feasible;

(3) The achievement of procurement objectives will be enhanced by the use of a contract that effectively motivates the contractor toward exceptional performance, and permits DOE the flexibility to evaluate both actual performance levels and the conditions under which such levels were achieved; and

(4) Any additional administrative effort and cost required to monitor and evaluate performance, as well as added fees available for award, are justified by the benefits expected.

(c) Consideration of concept.

(1) The opportunity to earn increased fees, the clear statement of goals, objectives and performance evaluation criteria, and the improved communication between DOE personnel and the contractor, are designed to encourage the contractor to perform the required work effectively, to control costs, and to optimize the timeliness and quality of performance. Base fees generally are negotiated commensurate with minimum acceptable performance, taking into consideration the various profit evaluation factors under §9-3.808-2. The base fee should be set at a minimum in order to provide a large award fee pool, thereby providing the contractor maximum incentive to improve performance. The award fee potential should be large enough to reward the contractor at any level of performance above minimum acceptable. In this regard, the award of additional fee for performance exceeding minimum acceptable in evaluated areas should be contingent upon the maintenance of at least minimum acceptable levels in all other areas of contract performance.

(2) Although award fee determinations are unilateral ones based upon judgmental evaluations, quantifying devices such as adjective ratings, point systems, or percentages of achievements may be used. Where used, these devices are for the sole purpose of quantifying the facts considered, and the amount of award fee earned shall not be merely the result of the application of summing, averaging, or a mathematical formula.

(3) For operating and other contracts which are subject to the fee schedules set forth in the Procurement Handbook, "Establishing and Negotiating Fee and Profit," the base fee should normally not exceed 50 percent of the computed CPFF fee. The base fee plus the award fee pool should normally not exceed the computed CPFF fee by more than 50 percent, provided that the sum does not exceed the fee limitations, provided in FPR 1-3.407-2.

(4) For contracts performed in commercial facilities, where the weighted guidelines (WGL) of §9-3.808-50 can be used to establish a reasonable fee for acceptable performance level, the base fee should normally not exceed 50 percent of the fee developed using the WGL. The base fee plus the award fee pool should normally not exceed the WGL developed fee by more than 50 percent, provided that the sum does not exceed the fee limitations provided in FPR 1-3.407-2.

(5) Prior approval of the Senior Procurement Official, Headquarters, is required for total fees (base fee plus award fee pool) exceeding the guidelines in (3) and (4).

(d) Payment of fees. Base fees may be paid periodically as provided for in the contract. Award fees will be paid only after the amount of the award fee earned has been established. Payments of award fees earned will be made promptly after the award decision has been made in each evaluation period.

(e) Limitations.

(1) The CPAF contract shall not be used (i) in procurements in which all factors to be considered in the award fee arrangement (e.g., cost, delivery, performance) can be measured objectively in terms of predetermined incentive targets, or (ii) where the contract amount, term of performance, or the benefits expected from use of the award fee arrangement are insufficient to warrant any additional administrative effort or cost that may be required.

(2) Cost-reimbursement type contracts having award fee arrangements limited to technical performance considerations are prohibited because they may increase cost disproportionately to any benefits gained. Instead, the award fee arrangement shall include both technical performance and business management considerations tailored to the needs of the particular situation. The only exception is a situation where cost estimating reliability and other factors are such that the negotiation of a separate, predetermined incentive sharing arrangement applicable to cost performance is determined both feasible and advantageous. The resulting contract would then be identified as a cost-plus-incentive-fee/award-fee combination type. The goals and evaluation criteria should be results-oriented. The award fee should be concentrated on the end product of the contract, that is, output, be it hardware, research, development, demonstration or services, together with business management considerations. However, input criteria such as equal employment opportunity, small business programs, functional management areas, such as safety, security, etc., cannot be disregarded and may be appropriate criteria upon which to base some part of the award fee. Specific goals or objectives should be established in relation to each performance evaluation criterion against which contractor performance is measured.

(f) Evaluation.

(1) The contract should provide for evaluation at stated intervals during contract performance, so that the contractor will know how its performance is rated and what areas need to be improved. Partial payment of award fee earned will correspond to the evaluation periods. This will make effective the incentive which the award fee was designed to create by inducing the contractor to improve poor performance or to continue excellent performance.

(2) The contractor shall be furnished the performance evaluation criteria to be used to arrive at the award fee before award of the contract. The goals and objectives should be clearly set forth.

(3) As a part of contract negotiation, the Government should obtain agreement and incorporate into the contract a provision that the Government unilaterally can change the performance evaluation criteria, goals and objectives, weights and rating plan after reasonable advance notice to the contractor. The specific number of days constituting reasonable notice should be agreed to in advance by the parties.

(g) Organization and administration.

(1) Individuals will be designated as performance monitors. They will be responsible for evaluating, in their assigned areas, the contractor's performance against the established criteria.

(2) A board will be established to evaluate the contractor's performance (based on monitor's reports, contractor's input and other information) and to recommend the amount of the award fee to the fee determination official.

(3) The fee determination official will be an individual who is organizationally above the persons who are directly involved in performance evaluation.

(4) The contractor should be given an opportunity to present matters to the board or the fee determination official on its own behalf.

(h) Contract coverage and provisions.

(1) The required FPR and DOE-PR cost reimbursement clauses set forth in §§ 9-7.2 and 9-7.4 are required for Award Fee Contracts. Modifications however should be made in the Allowable Cost, Fee and Payment clause, the Limitations of Funds clause and Changes clause as follows:

(i) The words "base fee and award fee" should be substituted for the term "fixed-fee" where it appears in paragraph (a) of the clause entitled Changes. (FPR 1-7.202-2).

(ii) The words "base fee" should be substituted for the work fee in paragraph (g) of the clause entitled "Limitation of Funds." (FPR 1-7.202-3(b)) and "Limitation of Costs" (FPR 1-7.202-3(b)).

(iii) The term "base fee" should be substituted for the term "fixed fee' or "fee" wherever they appear in the clause entitled "Allowable Cost, Fee, and Payment", except in (a)(2) of that clause which should be changed to read "such base fee, if any, and such additional fee as may be awarded as provided for in the schedule." (FPR 1-7.202-4, as modified by DOE-PR 9-7.202-4).

(2) In addition to the changes in the general provisions as required in paragraph (h)(1) of this section, the ARTICLES shown below should be included in the schedule of award fee contracts. Modifications to these provisions may be made to meet individual situations and any ARTICLE or specific requirement therein should be deleted when it is not applicable to a given contract. If substantial changes are believed appropriate, consultation with the Office of Procurement Policy—DOE Headquarters, is advisable.

Article (Insert Article Number)—Estimated Cost, Base Fee, and Award Fee

The estimated cost of this contract is $ (Insert Amount). A base fee of $ (Insert Amount) is payable in accordance with the ARTICLE entitled "Payment of Base and Award Fee". In addition a maximum Award Fee of $ (Insert Amount) is available for payment in accordance with the ARTICLE entitled "Payment of Base and Award Fee".

Article (Insert Article Number)—Payment of Base and Award Fee

Base Fee. The government will make payment of the base fee in (Insert Number) increments. The amount payable shall be based on the progress as determined by the Contracting Officer and shall be subject to any withholdings as may be provided for elsewhere in this contract.

Award Fee. The government will promptly make payment of any Award Fee upon the submission, by the contractor to the Contracting Officer or his authorized representative, of a public voucher or invoice in the amount of the total fee earned for the period evaluated. Payment shall be made without the need for a contract modification.

Article (Insert Article Number)—Determination of Award Fee Earned

A. The government shall at the conclusion of each specified evaluation period(s) evaluate the contractor's performance for a determination of award fee earned. The contractor agrees that the determination as to the amount of award fee earned will be made by the government Fee Determination Official (FDO) and such determination concerning the amount of award fee earned is binding on both parties and shall not be subject to appeal under the "Disputes" clause or to any other appeal clause.

B. It is agreed that the evaluation of contractor performance shall be in accordance with the Performance Evaluation Plan referenced in the ARTICLE entitled "Performance Evaluation Plan" and that the contractor shall be promptly advised in writing of the determination, and the reasons why it was or was not earned. It is further agreed that the contractor may submit a self-evaluation of performance for each period under consideration. While it is recognized that the basis for determination of the fee shall be the evaluation by the government, any self-evaluation which is received within (Insert Number) days after the end of the period being evaluated, may be given such consideration, if any, as the FDO shall find appropriate.

C. The FDO may, in his sole discretion, specify in any fee determination that fee not earned during the period evaluated may be accumulated and be available for allocation and/or award in future evaluation periods. When such a determination is made the Article entitled "Distribution of Award Fee" shall be adjusted to reflect such allocations.

Article (Insert Article Number)—Performance Evaluation Plan

A. A contractor Performance Evaluation Plan upon which the determination of award fee shall be based, including the criteria to be considered under each area evaluated and the percentage of award fee, if any, available for each area, will be unilaterally established by the government. A copy of the plan shall be provided to the contractor (Insert Number) calendar days prior to the start of the first evaluation period.

B. The Performance Evaluation Plan shall set forth the criteria upon which the contractor will be evaluated for performance relating to any (1) Technical, (2) Management, and (3) Cost Functions selected for evaluation.

C. The Performance Evaluation Plan may, consistent with the contract, be revised unilaterally by the government at any time during the period of performance. Notification of such changes shall be provided to the contractor (Insert Number) calendar days prior to the start of the evaluation period to which the change will apply.

Article (Insert Article Number)—Distribution of Award Fee

A. The total amount of award fee available under this contract is assigned to the following evaluation periods in the following amounts:

Evaluation Period

Available Award Fee

B. In the event of contract termination, either in whole or in part, the amount of award fee available shall represent a pro rata distribution associated with evaluation period activities or events as determined by the Fee Determination Official.

§9-3.408 Letter contract.

(a) A letter contract may be entered into only when:

(1) The urgency of the requirement necessitates that the contractor be given a binding commitment so that work can commence immediately;

(2) Preparation of a definitive contract in sufficient time to meet agency requirements is not possible. The procurement file shall contain documentation to support the above determination; and

(3) Prior approval is obtained from the Head of the Procuring Activity or designee.

(b) The Government's obligation shall be limited to reimbursement of the contractor's costs incurred under the terms of the letter contract through the termination date.

(c) Any proposed letter contract or amendment to a letter contract which would result in obligation of funds in an amount greater than 50 percent of the estimated cost of the procurement, or provides for a period of effectiveness of more than 120 days, must be approved by the DOE Senior Procurement Official, Headquarters, or a designee.

Subpart 9-3.6 Small Purchases

§9-3.600 Scope of subpart.

The policies and procedures for the purchase of supplies and nonpersonal services from commercial sources, when the anticipated amount involved in any one transaction does not exceed $10,000, shall be those prescribed in FPR Subpart 1-3.6 and consistent with Public Law 95-507 (Oct 24, 1978:92 STAT 1757).

§9-3.601 Procurements under $10,000.

Procurements under $10,000 are reserved exclusively for small business if they are awarded through small purchase procedures, unless the Contracting Officer is unable to obtain two or more offers from small business concerns that are competitive with market prices, quality and delivery.

Accordingly, every proposed procurement of supplies and services which has an anticipated value under $10,000, and which is to be accomplished under simplified purchase procedures, shall in all cases be reserved exclusively for small businesses except where the Contracting Officer determines there is no reasonable expectation that two or more small business concerns will submit acceptable offers at a reasonable price.

§9-3.603 Competition.

§9-3.603-1 Solicitation. (Reserved)

§9-3.603-2 Data to support small purchases.

(a) Purchases in excess of $500.00 shall be supported by documentation, in the file, in accordance with FPR 1-3.603-2(b).

(b) Noncompetitive purchases in excess of $500.00 shall contain, in the file, a brief justification for noncompetitive procurement. The justification shall set forth enough facts and circumstances to clearly and convincingly establish that competition would not have been feasible or practicable.

(c) Contracting Officers shall include in the contract file, an appropriate notation when award of small purchases is made to other than a small business.

§9-3.604 Imprest Funds (Petty Cash) method.

§9-3.604-3 Agency responsibilities.

The procedures for the establishment and use by the DOE of imprest funds are set forth in appropriate Agency directives.

§9-3.605 Purchase Order Forms.

§9-3.605-1 Standard Form 44, Purchase Order Invoice Voucher.

The use of Standard Form 44 is optional within the DOE. Contracting Officers shall be held accountable for books of Standard Form 44's issued to them. Heads of Procuring Activities shall issue detailed instructions, consistent with the provisions in Standard Form 44's and FPR 1-3.605-1, providing for accountability and safeguarding of the forms when used. Contracting Officers, when using this form, will obtain any necessary obligation of funds and will limit procurement actions to items not otherwise restricted by law or regulation.

§9-3.605-3 Agency order forms.

DOE Standard Order Form 103 shall be used in lieu of Standard Form 147. Standard Form 36 (Continuation Sheet) may be used in lieu of Standard Form 148 as a continuation sheet, when required.

Subpart 9-3.7 Negotiated Overhead Rates

§9-3.705-50 Procedure for close-out in advance of final rates.

(a) Contracts may be closed out under the conditions described under (b) below. The use of this procedure involves the exercise of judgment based upon considerations such as the significance of the amount involved, previous experience, and apparent reasonableness of overhead data furnished by the contractor.

(b) This procedure may be applied to cost reimbursable and flexibly priced type contracts, where:

(1) Irrespective of the total value of the contract, the total amount billed and claimed, and as yet unsettled, does not exceed $500,000;

(2) Contract performance has been physically completed, required goods and/or services have been received and accepted by the Government, and all other appropriate administrative actions, except financial settlement, have been accomplished consistent with the contract terms and conditions;

(3) Final overhead rate settlement in accordance with FPR 1-3.705(a) will be delayed beyond the established time for contract close-out (§9-1.354);

(4) Indirect expense rates which are used for the purpose of expediting the closing of contracts, which are completed prior to the end of a cost accounting period, need not be those finally determined or negotiated for that period; but they shall be developed to represent a full cost accounting period;

(5) Indirect costs allocated to the contract can be established based upon other available information; and

(6) The contractor agrees to negotiate a settlement under this procedure and agrees that (i) the rates negotiated for the instant contract are final (but do not have the effect of setting a precedent), and (ii) no subsequent adjustments shall be made, or the effect of any quick close-out shall not affect any other contract for any over- or under-recovery disclosed at the time of final overhead rate settlement.

(c) Implementation of this procedure does not preclude the use of audit assistance. As a practical matter, a decision not to audit should be the exception. Upon receipt of the contractor's final voucher, the cognizant Government audit office should be provided a copy and requested to provide necessary audit services. The extent of these required services may vary. Under a Special Research Contract the Contracting Officer may determine not to audit, or may request an audit of direct costs only. Under a cost-type contract with a commercial firm, the audit statement may include direct and indirect costs and reflect qualifications relative to the indirect costs which require resolution before a final rate will be derived. In this latter case, the Contracting Officer may determine that the issue, for which there is an audit qualification (exception or unresolved item), is not significant, or that it can be negotiated, and proceed to reach agreement with the contractor. The memorandum of negotiation shall reflect what was done and supporting rationale shall be provided.

(d) When this procedure is used, the conditions of paragraph (b)(6) above must be included in the supplemental agreement reflecting the results of the final contract cost negotiations.

(e) In those instances where the magnitude of the cost differences precludes application of this procedure, the Contracting Officer, with other members of his team, e.g., pricing, audit, property, legal, and program staff, should develop an estimate of funds which may yet be required by the contract and take timely appropriate action to deobligate excess funds.

Subpart 9-3.8 Price Negotiation Policies and Techniques

§9-3.800 Scope of subpart.

This subpart implements and supplements the price negotiation policies and techniques set forth in FPR Subpart 1-3.8. Those policies and techniques applicable to architect-engineer services are set forth in FPR Subpart 1-4.10 and Subpart 9-4.10.

§9-3.801 Basic policy.

(a) FPR 1-3.801-2 and 1-3.801-3 delineate the responsibilities of Contracting Officers and other personnel, respectively, in the procurement process.

(b) Access authorizations shall not be a limiting factor in obtaining full and free competition except where time will not permit securing additional clearances. If access to classified information is required either (1) to submit proposals in response to DOE requests for such proposals, (2) to respond to requests by DOE for expressions of interest, or (3) to inspect facilities in connection with subparagraph (1) or (2) of this paragraph, a reasonable number of access authorizations will be furnished without charge.

§9-3.802 Preparation for negotiation.

(c) Requests for proposals (RFP's).

(1) Requests for proposals (RFPs) will describe generally the process by which selection will be made from among competing proposals. If proposers must meet certain qualifications in order to be considered, these qualification criteria shall be stated in the RFP. In addition, the evaluation criteria against which all proposals will be rated shall be identified in the RFP and the relative importance of each must be described in general terms. Normally, the RFP should require that a proposal be in at least two parts; a "technical proposal" and a "business and management proposal." Each of the parts should be separate and complete in itself so that evaluation of one may be accomplished independently of evaluation of the other. The instructions to the offerers concerning the business and management proposal should require submission of cost information in sufficient detail to allow a complete cost analysis. The RFP should generally provide that the technical proposal not contain any reference to cost.

(2) The Contracting Officer or authorized representative shall have sole responsibility for disseminating any information with respect to, or in clarification of, RFPs. Such information or clarification shall be in writing, usually in the form of an amendment to the RFP, and shall be furnished to all concerns to whom the original solicitation was sent.

§9-3.802-1 Consideration of late proposals.

Pursuant to FPR 1-3.802-2, the procedures contained in FPR 1-3.802-1 for the consideration of late proposals and modifications may not be applicable to certain classes of negotiated procurements. Accordingly, when the Senior Procurement Official, Headquarters, makes a determination that the procedures set forth in FPR 1-3.802-1 are not applicable, that official may authorize, with the concurrence of Counsel, the adoption of the procedures in FPR 1-3.802-2, except for prime procurements of general purpose automated data processing equipment (ADPE). Use of the procedures set forth in FPR 1-3.802-2 for ADPE prime procurement must be expressly authorized by the Commissioner, Automated Data and Telecommunications Service, General Services Administration. Requests for such authorization should be sent to the Senior Procurement Official, Headquarters, for necessary action.

§9-3.805 Selection of offerors for negotiation and award.

§9-3.805-1 General.

(a) The process by which one offer is selected from among all competing offers for negotiation and award of a contract generally starts with a request for proposals (RFP). The RFP describes the requirement to be satisfied by the procurement and sets forth the technical, business and management, and cost evaluation criteria for the selection and should clearly indicate their relative importance. The criteria should also be listed in descending order of importance. Where considered beneficial, a preproposal conference may be held after issuance of the RFP so that potential offerors may gain a clearer understanding of the requirements and objectives of the procurement. FPR 1-1.12 and §9-1.12 prescribe policies concerning the responsibility of prospective contractors.

(b) After proposals have been received and evaluated, in accordance with criteria in the RFP, written or oral discussions shall be conducted with all offerors in the competitive range, except as provided in FPR 1-3.805-1(a). A proposal is in the competitive range unless there is no real possibility ~~that it~~ may become improved as a result of written and/or oral discussions, to the point where it becomes the most acceptable.

(c) The Contracting Officer shall point out to each offeror any ambiguities or uncertainties in its proposal. For research, development, demonstration, operating and management contracts, the discussions are intended to assist the Source Evaluation Board (SEB) in understanding fully the proposals and their strengths and weaknesses based upon the individual efforts of each proposer, in assuring that the meanings and points of emphasis of RFP provisions have been adequately conveyed to the offerors so that all are competing equally on the basis intended by the Government, and in evaluating the qualifications of the personnel proposed by each firm. Where the proposed award is not for research, development, demonstration, operating and management (eg. supplies and services) the Contracting Officer should point out instances in which aspects of a proposal contain a weakness in relation to the Governments requirements. In the course of the discussions, Government participants should be careful not to transmit information which could give leads to one proposer as to how its proposal may be improved or which could reveal a competitor's ideas. In any case the Contracting Officer shall then give each offeror a reasonable opportunity to support, clarify, correct, improve, or revise its proposal up to a common cut-off date. An offeror shall not be informed of the relative strengths and weaknesses of its proposal in relation to those of other offerors, nor shall an offeror be given information as to how its proposal might be improved or which could reveal ideas or concepts contained in a competitor's proposal.

(d) Except as provided in §9-3.805-1(e), revised proposals are evaluated, selection is made and negotiations may be conducted with the selected offeror but only to definitize a final agreement on price, terms, and conditions, etc. (No factor which could have had any effect on the selection process may be changed after the common cut-off date for discussions.)

(e) The SEB procedures are intended to provide the Source Selection Official with sufficient information to select an offeror for negotiation on the basis of its proposal. However, it is within the discretion of the source Selection Official to select multiple offerors from those within the competitive range for negotiation and to direct that discussions be reopened with those offerors and that best and final offers be obtained on the basis of fully definitized contract documents executed by the offerors. The Contracting Officer should seek correction of each offeror's correctable weaknesses using only technical and other information which the Government is entitled to use for this purpose. However, care shall be taken to avoid transferring the idea of one offeror to another. Similarly, the most favorable prices, estimated costs, fees, contractual terms, and business arrangements should be sought without engaging in "auctioning techniques". At the conclusion of discussions, a final common cut-off date which allows a reasonable opportunity for submission of best and final offers shall be established and all participants notified.

(f) See §9-3.103 for dissemination of procurement information.

§9-3.805-50 Selection procedures.

(a)(1) The following officials are designated as Source Selection Officials for all source selection decisions involving awards of contracts when the value of the selection decisions, which shall include the sum of all awards, all phases or options, and all cost shares regardless of derivation, will cumulatively total in excess of or up to and including the following amounts:

Source Selection Official	Contracts in excess of or up to and including the following amounts
(i) Secretary, Deputy Secretary, or Under Secretary.	In excess of $50 million
(ii) Cognizant Assistant Secretary, Administrators, Director of the Office of Energy Research, Director of Procurement and Assistance Management, Director of Administration or Controller. Note: This authority may be delegated on a case-by-case basis only when approved by the Under Secretary.	In excess of $10 million up to $50 million
(iii) Cognizant Office Directors. Note: This may be delegated on a case-by-case basis to a field office manager or a project manager with the concurrence of the Senior Procurement Official, Headquarters.	In excess of $5 million up to $10 million
(iv) The Source Selection Official shall be the HPA, an official designated by the HPA or the Contracting Officer.	Up to $5 million

(2) Exceptions.

The Secretary, Deputy Secretary, or Under Secretary may retain source selection authority on any specifically designated selection action expected to result in contracts, regardless of dollar value. The cognizant Assistant Secretaries, Administrators, Director of Energy Research, Director of Procurement and Assistance Management, Director of Administration, or Controller may retain source selection authority on specifically delegated contracts, under $10,000,000.

(3) The retention of authority described above shall be signed by the appropriate retaining official and placed in the official contract file.

(b) Source evaluation board (SEB) procedures shall be used for all negotiated competitive prime procurements expected to exceed $5 million, excepting procurements for architect-engineer services, and procurements specifically waived by the Senior Procurement Official, Headquarters. Detailed guidance regarding the designation and operation of the SEBs are set forth in the SEB Handbook (Procurement Regulation Handbook Number 1). RFPs prepared by formal SEBs are reviewed by a solicitation review panel conducted by Headquarters. SEB procedures shall be used when applicable in lieu of subparagraphs (c) through (f) below.

(c) Negotiated competitive procurements equal to or below $5 million are not subject to the SEB Handbook (Procurement Regulations Handbook No. 1) except for those situations as determined by the Senior Procurement Official, Headquarters. For those under $5 million, less formal procedures are used. For those procurements under $5 million but more than $1 million, source evaluation panels may be established. These panels may follow the policies and procedures set forth in the SEB Handbook (Procurement Regulations Handbook No. 1) as a guide. For procurements under $1 million, less formal source evaluation and selection procedures shall be used.

(d) The Contracting Officer may form teams to evaluate the technical, business and management, and cost aspects of proposals. When teams are used, each will function independently of the other and report its findings to the Contracting Officer. The Contracting Officer will discuss those findings with the teams (or representatives thereof) separately or together, as may be more helpful. The Contracting Officer will negotiate and execute the contractual instrument, using, in many cases, some of the same specialists who participated in earlier evaluations and discussions. DOE-PR Part 9-51 sets forth administrative requirements for the review and approval of certain contract actions.

(e) In selections other than where price is the determining factor, the evaluation procedures set forth in (1), (2) and (3) below should be considered:

(1) Technical evaluation. Generally, the Contracting Officer must rely on scientific and engineering personnel for assistance in reviewing proposals from a technical point of view. It is imperative, therefore, that technical evaluations and findings be fully documented and reviewed by responsible personnel. The report should reflect the scoring and ranking of the proposals and shall identify each proposal as acceptable or unacceptable. The report shall also include a narrative evaluation specifying the strengths and weaknesses of each proposal, and any reservations or qualifications that might bear upon the selection of sources for negotiation and award. Concrete technical reasons supporting a determination of unacceptability with regard to any proposal shall be included. After evaluation and preparation of written and signed evaluation findings by the technical evaluators, such evaluations and proposals shall be returned to the Contracting Officer or authorized representative, and maintained as a permanent record in the contract file.

(2) Business and management evaluation. Management capabilies of the offeror to perform the required work in a timely manner must be appraised. In making this appraisal, the following factors, as appropriate, and as stated in the RFP must be considered: the company's management organization; past performance; reputation for reliability; availability of required facilities; cost controls; ability to control, maintain and account for any property provided by the Government; the offeror's willingness to devote its resources to the proposed work with appropriate diligence; and financial capacity, certifications, representations, special clause requirements and any other pertinent administrative and business information that may have been requested in the RFP.

(3) Price/cost considerations. Each proposal requires some form of price or cost analysis. The evaluation should consider items such as categories and amounts of labor, indirect costs, materials, travel, computer time, as well as information with regard to the contractor's past cost performance, including contracts or subcontracts for like services or supplies. The Contracting Officer must exercise judgment in determining the extent of analysis in each case. Price/cost analysis should be performed by personnel trained in this discipline. (The "Armed Services Procurement Regulation Manual for Contract Pricing" ASPM No. 1, may be used as a guide in the review, analysis, negotiation and documentation of contract prices.)

(f) Personnel from DOE, other Government agencies, consultants, and contractors including those who operate or manage Government-owned facilities may be used in the selection process as advisors when their services are necessary and available. When personnel outside the Government, including those who operate or manage Government-owned facilities, are used as advisors, approval and disclosure procedures as outlined in §9-3.150-4(b) and (c) shall be followed. In all instances, such personnel will be required to comply with DOE conflict of interest regulations and nondisclosure of information requirements.

§9-3.805-51 Noncompetitive procurement.

(a)(1) While negotiated procurement shall be on a competitive basis to the maximum practical extent (FPR 1-3.101(d)) and reasonable competition shall be obtained in making small purchases in excess of $500 (FPR 1-3.603-1(a)(1)), there are circumstances where one source (or groups of sources) has exclusive capability to perform the work within the time required and at reasonable prices, e.g., by reason of experience, specialized facilities, or technical competence. In such a circumstance, the initiating program office may conclude that only one source (or groups of sources) is qualified to perform the work and, therefore, recommend that a contract be negotiated only with that source or group. (In the case of a "group sole source" situation, a justification is required for limiting competition to that group and for the allocation of work among members of the group.) The recommendation, in writing, shall be contained in a separate document entitled "Justification for Noncompetitive Procurement," and shall examine the reasons for the procurement being noncompetitive in accordance with paragraph (c) below.

(2) For a noncompetitive procurement, a recommended justification shall be attached to the procurement request when the request is sent to a Contracting Officer for action.

(3) A justification for noncompetitive procurement is also required where "new" procurements (i.e., outside the contractual scope of work) are initiated through modifications to existing contracts.

(4) If a noncompetitive procurement has been justified and approved, in accordance with this section, as a part of an annual procurement plan and such plan has been reviewed and approved, it will not be necessary to resubmit the justification for approval at the time each individual procurement action is processed. Such justifications shall be made a part of the permanent contract file (see DOE-PR §9-1.313).

(b) The provisions of this section do not apply to:

(1) Procurements of electric power or energy, gas (natural or manufactured), water, or other utility;

(2) Procurements of educational services from nonprofit institutions;

(3) Procurements resulting from program opportunity notices, or program research and development announcements (which are forms of competitive solicitations);

(4) Acquisitions from or through other Government agencies;

(5) Contracts which are subject to separate justification for recompetition or extension;

(6) Contracts resulting from unsolicited proposals (because they are subject to the approval procedures for justifications for unsolicited proposals);

(7) Special Research Contracts with educational institutions and extensions thereof (because they are subject to the separate process for SRCs); and

(8) Subscriptions to periodicals (under $10,000).

(c) Justification for noncompetitive procurement.

(1) The document entitled "Justification for Noncompetitive Procurement" shall examine the reasons for the procurement being noncompetitive and shall contain, in the first sentence of the document, an appropriate recommendation (e.g., "I recommend that negotiations be con-

ducted only with (name of entity) for the supplies and services described herein.") For small purchases the justification for non-competetive procurements should be in accordance with small purchase procedures.

(2) Each justification shall set forth enough facts and circumstances to clearly and convincingly establish that competition would not have been feasible or practicable. The following format includes considerations to be made in preparing the justification.

(i) Description of supplies or services to be procured.

A. A brief, general, nontechnical description and statement of the general application and particular significance or specialized character of the procurement.

B. A description of all associated supplies or services, e.g., technical data, reports, engineering services, and so forth, to be procured.

(ii) Procurement history, estimated future requirements, and long-range procurement objectives.

A. A brief statement of the technical and contractual evolution of the supplies or services being procured from initiation to present status.

B. A brief statement as to whether the work is a continuation of previous effort performed by the proposed contractor.

C. A reference should be made to any advance planning information previously prepared or furnished, together with information with respect to any changes proposed in the present justification which represent a departure or modification of prior procurement plans, including a statement of the effect of the changes, if any, on scheduled milestones.

D. A brief statement as to what actions have been taken to develop competition and eliminate a noncompetitive situation in future procurements of the proposed supplies or services.

(iii) Estimated cost.

A. The estimated cost of the procurement and a brief description of the assumptions made and data used by the initiating program office to develop the estimate.

B. The estimated cost listed by fiscal year.

C. Whether the proposed contractor or the Government has a substantial investment of some kind that would have to be duplicated at Government expense by another source.

(iv) Schedule requirements.

A. The basis for establishing schedule requirements.

B. An explanation of the urgency, if any, of the requirement. Describe why the schedules are critical and why only the proposed contractor can meet them.

C. Describe what significant cost savings or other benefits could result if schedules could be relaxed and whether competition could thus be obtained.

(v) Exclusive capability.

A. Does the proposed contractor have personnel considered unquestionably predominant experts in the particular field?

B. What prior experience of a highly specialized nature does the source exclusively have that is vital to the proposed effort?

C. What facilities and test equipment does the source exclusively have that are complex or specialized and vital to the effort?

D. Is competition precluded because of the existence of patent rights, copyrights, secret processes, trade secrets, technical data, or other proprietary data?

E. What other capability and capacity does the proposed contractor have that is necessary for the specific effort and makes it clearly the only source that can perform the work on the required time schedule without incurring clearly unreasonable costs?

(vi) Other.

A. If lack of drawings or specifications is a constraining factor, why is the proposed contractor clearly best able to perform under these circumstances? Why are the drawings and specifications lacking? What is the lead time required to get drawings and specifications suitable for competition?

B. Are parts or components being procured as replacement parts in support of equipment specially designed by a manufacturer, where data available is not adequate to assure that the parts or components obtained from another source would perform the same function?

(d) Review and approval. The justification shall contain a recommendation, concurrence (when needed) and approval as follows: (In the case of cost shared contracts, review levels shall be based on the sum of the contractor and Government shares.)

(i) The recommendation shall be prepared and reviewed within the initiating office at such levels as are deemed appropriate by the Senior Program Official for procurements initiated by Headquarters or the Head of the Procuring Activity for field initiated procurements. The objective of maximizing the use of competitive procurement procedures as well as the complexity or cost of a procurement shall be used as a guide in establishing the appropriate level of responsibility for preparation of a noncompetitive recommendation. In establishing levels for the review of such recommendations, the Senior Program Official or Head of the Procuring Activity shall assure that the recommendation is reviewed at a senior organizational level in order to assure that competition is sought whenever possible.

(ii) The more complex and costly transactions will benefit from early coordination with counsel. Justifications exceeding $1,000,000, or such lower level as counsel may determine, shall be submitted by the initiator to counsel, at the Headquarters or field location of the initiator, for concurrence prior to forwarding to the Contracting Officer. The Senior Program Official or the Head of the Procuring Activity, in consultation with counsel, may establish lower thresholds as appropriate to their organizations and circumstances.

(iii) The justification, following review of the recommendation and concurrence of counsel (if required or considered appropriate), shall be forwarded to the Contracting Officer. If the justification is acceptable to the Contracting Officer, review shall be sought at such level as the Head of the Procuring Activity may require. In specifying levels of review, the HPA shall assure that justifications of more than $10,000 are reviewed at a level above the Contracting Officer as required by Section 1-3.101(d) of the FPR. The HPA shall further assure that the official designated as the reviewing official is a Contracting Officer.

(iv) Justifications may be approved without regard to the award authority limitations. An information copy of the approved justification shall be furnished to the Contract Business Clearance Division, Procurement Review Office, Headquarters, for advisory purposes whenever it is anticipated that the contract award will require Headquarters approval.

§9-3.807 Pricing techniques.

§9-3.807-3 Cost or pricing data.

(a) The certification requirements of FPR 1-3.807-3 need not be applied to cost-reimbursement type operating contracts, on-site service contracts of a continuing nature, and educational institution contracts covered by the cost principles contained in either OMB Circular A-21 or FPR 1-15.3. This exemption does not apply to any cost plus incentive fee contract, where the contractor's actual fees are adjusted in accordance with the negotiated share ratio.

§9-3.807-50 Approvals and waiver.

(a) Heads of Procuring Activities, for contracts estimated to be within the limits of their delegated authority, may, without power of redelegation, approve the findings required by FPR 1-3.807-1 (b)(1)(ii)(C) and 1-3.807-3(f)(1).

(b) Heads of Procuring Activities, for contracts estimated to be within the limits of their delegated authority, may, without power of redelegation, waive the requirements for cost or pricing data under the circumstances set forth in FPR 1-3.807-3(b)(2), 1-3.807-3(d)(2), and 1-3.807-6, provided that any such waivers are promptly reported to the Procurement and Assistance Management for its information.

§9-3.808 Profit or fee.

§9-3.808-1 General.

(a) A fair and reasonable provision for profit or fee is called a profit objective. The profit objective, when combined with the estimated cost of contract performance, becomes the contract price objective the DOE negotiator takes into negotiations with a contractor. The profit objective is an amount which, in the judgment of the negotiator, is appropriate for the procurement. The price objective should be reasonable in relation to the task to be performed and the requirements placed on the contractor.

(b) DOE's policy is to: (1) reward contractors who undertake more difficult work requiring higher skills; (2) allow contractors the opportunity to earn profits commensurate with the cost risk they are willing to assume — the greater the risk, the higher the profit objective; (3) reward contractors who have excellent records of performance; and (4) reward contractors who provide their own facilities and financing or who have established their competence through prior research or development work undertaken at their own risk.

(c) The profit objective will be determined individually for each contract. Across-the-board agreements as to rates of profit or fee will not be made. The determination of a fair and reasonable profit or fee is a matter of sound business judgment.

§9-3.808-2 Factors for determining profit or fee.

(a) The factors in FPR 1-3.808-2 will be used in establishing profit objectives. However, if the work is to be performed in commercial facilities, the weighted guidelines technique in §9-3.808-50, will be used in place of those factors when the contract is estimated to exceed $500,000, and may be used on contracts below that figure.

(b) The amounts payable as fees on contracts (i) for operation of Government-owned facilities; (ii) for performance of on-site support services, and (iii) for performance of construction and architect-engineer services will not exceed maximum amounts derived from the appropriate fee curve set forth in the Procurement Handbook "Establishing and Negotiating Fee and Profit." Requests to pay fees in excess of the maximum will be sent to the Senior Procurement Official, Headquarters for review and approval.

(c) Refer to FPR 1-3.405-5(c)(2) for statutory limitations on fixed fees for cost-plus-a-fixed-fee contracts. The application of the statutory limitations to cost-plus-incentive-fee contracts and contracts with performance incentives are contained in FPR 1-3.405-4(c) and 1-3.407-2(c)(2) respectively. The exemption from the fee limitations for DOE architect-engineer contracts covering former AEC and BPA functions are contained in §9-3.405-5(b).

(d) Refer to §9-3.405-50 for cost-plus-award-fee contracts.

§9-3.808-50 Weighted guidelines.

(a) Use of weighted guidelines is an analytical technique that requires consideration of the relative value of appropriate profit factors in establishing a profit objective and conducting negotiations. It also provides a basis for justifying the objective and explaining any significant departure from the objective in negotiating a final agreement.

(b) Analysis of weighted guideline factors is done using information available in proposals, audit reports, performance appraisals, preaward surveys, and the like. No more data on or analysis of costs is required to establish a profit objective than is required to determine reasonable estimated costs.

(c) If use of weighted guidelines results in a profit objective in excess of limitations established by statute or regulation, the percentage allowed pursuant to such limitations shall be the profit objective. No local administrative ceilings may be placed on profit or fee.

(d) The factors set forth below shall be used in applying weighted guidelines. The weight ranges listed after each factor shall be used in all instances.

(e) Use of the weighted guidelines method of profit analysis is discussed in detail in the Procurement Handbook "Establishing and Negotiating Fee and Profit."

Profit Factors	Weight Ranges
Contractor's Input to Total Performance	
Direct materials	
Purchased parts	1 to 4%
Subcontracted items	1 to 5%
Other materials	1 to 4%
Engineering labor	9 to 15%
Engineering overhead	6 to 9%
Manufacturing labor	5 to 9%
Manufacturing overhead	4 to 7%
General and administrative expenses	6 to 8%
Contractor's Assumption of Contract Cost Risk	0 to 7%
Type of contract Reasonableness of cost estimate Difficulty of contract task	
Record of Contractor's Performance	-2 to +2%
Small business participation Management Cost efficiency Reliability of cost estimates Timely deliveries Quality of product Inventive and developmental contributions Labor surplus area participation	
Selected Factors	-2 to +2%
Source of resources Government or contractor source of financial and material resources. Special achievement Other	
Special Profit Consideration	0 to +4%

§9-3.808-51 Contracts with not-for-profit organizations (other than educational institutions).

(a) It is general DOE policy to pay fees in contracts with not-for-profit organizations; however, it is a matter of negotiation whether a fee will be paid in a given case. In making this decision, consider whether the contractor is ordinarily paid fees for the type of work involved. No fees will be paid when the contract involves a cost-sharing arrangement.

(b) Where the contract with the not-for-profit organization is for the operation of Government-owned facilities, calculate fees using the procedures and schedules applicable to operating contracts set forth in the Procurement Handbook "Establishing and Negotiating Fee and Profit." Where the contract work is to be performed in the contractor's privately-owned facilities, calculate fees using weighted guidelines.

(c) In computing the amount of fee to be paid, take into account the tax posture of the not-for-profit organization. While it is difficult to establish the degree to which a fee under any given contract contributes to an organization's overall net profit, assume that there is an element of profit in the fee paid.

(d) In order to assure consideration of the tax posture of not-for-profit organizations during fee negotiation, calculate the fee as for a contract with a commercial concern and then reduce it at least 25%. However, depending on the circumstances, Contracting Officers may pay fees somewhere between this amount and the appropriate fee for a commercial concern. When this is the case, document the contract files to specifically state the reason or reasons.

§9-3.808-52 Contracts with educational institutions.

(a) It is DOE policy not to pay fees under contracts with educational institutions.

(b) However, some university contractors operate Government/ owned laboratories essentially apart from, and not in conjunction with, their other activities and the complexity and magnitude of the work are not normally found in university contracts. If, in these cases, the parties are not able to agree as to the amount of central university indirect expenses for purposes of reimbursement under the contract, it is permissible to pay a "management allowance," which, where necessary, may exceed DOE's conservative estimate of anticipated central indirect expenses. However, the amount may not exceed the university's estimate of properly allocable central indirect expenses or the fee developed using the weighted guidelines, whichever is lower.

(c) As noted above, the payment of a management allowance can be justified only under special circumstances; accordingly, such arrangements shall not be negotiated without the prior approval of the Head of the Procuring Activity.

§9-3.809 Contract audit as a pricing aid.

(b) Auditor's reports on contract price proposals.

(1) Prior to negotiation of any contract or modification resulting from a proposal in excess of $500,000 for firm fixed-price and fixed-price with economic price adjustment provisions or $1,000,000 for all other contract types including initial prices, estimated costs of cost-reimbursement types, interim and final price redeterminations, escalation, target and settlement of price redeterminations, target and settlement of incentive types where the price will be based on cost or pricing data (FPR 1-3.807-3) submitted by the contractor, the Contracting Officer or authorized representative shall request an audit review by the contract audit activity. Also see FPR 1-3.807-2 and 1-3.809(b)(ii).

(i) The requirement for audit of proposals which exceed the thresholds may be waived at a level above the Contracting Officer when it is clear that information already available is adequate for the proposed procurement. In such case, the contract file shall be documented to reflect the reason for any such waiver, provided, however, that independent Government estimates of cost or price shall not be used as the sole justification for any such waiver.

(ii) Audits should be requested for proposals of less than the threshold limits where a valid need exists.

§9-3.814 Contract clauses.

§9-3.814-1 Price reduction for defective cost or pricing data.

The Head of a Procuring Activity, for contracts estimated to be within the limits of delegated authority, may, without power of redelegation, authorize the waiver cited in FPR 1-3.814-1(c).

Subpart 9-3.9 Subcontracting Policies and Procedures

§9-3.901 General.

(a) The clause set forth in §9-50.704-24 shall be inserted in all prime cost-reimbursement type operating contracts and on-site service contracts of a continuing nature.

(b) Policies and procedures to be used in review and approval of subcontracts entered into by operating and other on-site contractors are covered in §9-50.302-5.

(c) Pursuant to section 602(d)(13) of the Federal Property and Administrative Services Act of 1949, as amended, the limitations in section 304(b) of that Act concerning advance notification of cost-plus-a-fixed-fee subcontracts (provided such subcontracts do not exceed an estimated cost of $500) and fixed-price subcontracts over $25,000 or 5 per centum of the total estimated cost of the prime contracts are not applicable, provided the cost type prime contractor's procurement methods and system have been reviewed and approved. This provision applies only to those former AEC type functions now being performed by DOE.

Subpart 9-3.12 Cost Accounting Standards

§9-3.1210 Cost Accounting Standards Board report.

DOE HPAs shall submit a consolidated report in accordance with FPR 1-3.1210(c) to the Contract Pricing Policy Branch, Headquarters, within 90 days after the close of each calendar year.

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PART 9–4 SPECIAL TYPES AND METHODS OF PROCUREMENT

Subpart 9–4.4 Public Utilities

§9–4.400 Scope of subpart.

This subpart implements and supplements the policies and procedures set forth in FPR Part 1–4.

§9–4.406 Procurement policy and regulations.

§9–4.406–1 Policy.

(a) All utility services (except telecommunications) that are required for Government-owned and contractor-operated facilities shall be procured directly by DOE and not by the contractors that manage and operate these facilities for DOE.

(b) However, when it is economically advantageous or otherwise in the best interest of the Government, and subject to the provisions of §9–4.411–3(b), Heads of Procuring Activities may authorize a contractor that manages and operates a DOE facility to procure utility services on a subcontract basis. When an Operating Contractor is authorized to subcontract for utility services under the authority of this paragraph (b), a copy of the authorization, together with a statement of justification, should be sent to the construction element, Headquarters, for information purposes. Heads of Procuring Activities shall require contractors which they authorize to subcontract for utility services to comply with the requirements of §9–4.411–3, dealing with the prior review of certain proposed procurements.

§9–4.411–3 Prior review of certain proposed procurements.

(a) (Reserved).

(b) HPAs shall submit, to the utility element in the Directorate of Administration, Office of Facility Planning and Support for Headquarter's review and approval, proposed contracts for utility services (except telecommunications), including proposed authorizations under applicable GSA area-wide contracts, and proposed memorandums of understanding for consolidated purchase, joint use, or cross-service by DOE with other Government agencies, when one or more of the following circumstances applies:

(1) the annual cost of the service to be procured is estimated to exceed $50,000;

(2) a proposed connection charge, termination liability, or any other facilities charge (whether or not refundable) is estimated to exceed a total of $10,000; or

(3) the proposed term of the contract or agreement is in excess of one year.

Subpart 9-4.9 Unsolicited Proposals

§9-4.900 Scope of subpart.

This subpart implements FPR 1-4.9 and provides policies and procedures applicable to the handling of documents submitted as unsolicited proposals, including those for commercial demonstrations.

§9-4.902 Policy.

Because present and future needs demand fullest possible use of all resources in exploring alternative energy sources and technologies, it is DOE policy to stress the value of obtaining external sources of unique innovative methods, approaches, and ideas through unsolicited proposals while preserving the integrity of the procurement process through the application of reasonable controls. In furtherance of this policy, DOE will:

(a) Disseminate information on areas of broad technical concern whose solutions are considered relevant to the accomplishment of DOE's mission.

(b) Encourage potential proposers to consult with program personnel before expending resources in the development of written unsolicited proposals.

(c) Endeavor to distribute unsolicited proposals to all interested organizations within DOE.

(d) Process unsolicited proposals in an expeditious manner and, where practicable, keep proposers advised as discrete decisions are made.

(e) Assure that each proposal is evaluated in a fair and objective manner.

(f) Assure that each proposal will be used only for its intended purpose and the information contained therein will not be divulged without prior permission of the proposer.

§9-4.904 Definitions.

(a) Unsolicited proposal - for purposes of this subpart, the definition of unsolicited proposal contained in FPR 1 -4.9 does not include initial proposals or extensions or renewals of ongoing projects which fall under the provisions of §9-4.51, Special Research Contracts with Educational Institutions.

(f) Responsible official - The Senior Program Official or the head of the staff office within whose area of responsibility the work contemplated by the unsolicited proposal falls.

(g) Project officer - The individual designated by the responsible official, or designee, having responsibility for the unsolicited proposal.

(h) Receiving office - The office designated as the central control point for the receipt, distribution, accountability, and status reporting of unsolicited proposals.

(i) Notice of program interest - A method by which broad general technical problem areas needing investigation are published in order to stimulate the flow of unsolicited proposals. The notice describes problems, not desired solutions.

§9-4.908 Agency point of contact.

(a) All unsolicited proposals shall be submitted to a central control point within DOE to establish agency accountability, tracking, and reporting. Responsibility for controlling and accounting for unsolicited proposals from organizations and individuals is vested in the Senior Procurement Official, Headquarters.

(b) Unsolicited proposals shall be submitted to the Procurement and Assistance Management, DOE, Unsolicited Proposals Management Branch, PR-33, Washington, DC 20585.

§9-4.909 Receipt, review and evaluation.

(a) After the receiving office has acknowledged receipt of the document, completed its preliminary review and established accountability, it will send copies of the unsolicited proposal to the responsible official(s). Each unsolicited proposal that is circulated for a comprehensive evaluation shall have an agency control number and legend attached or imprinted on it by the receiving office identifying it as an unsolicited proposal, and stating that it shall be used only for purposes of evaluation.

(b) The responsible official shall assign a project officer and such other personnel as necessary to evaluate the proposal fairly and objectively. In some instances the responsible official may find it advantageous to subject the proposal to external rather than internal evaluation. In such cases, the prior written permission of the proposer shall be obtained.

(c) If, after evaluation, it is decided that the proposal will not be supported:

(1) The project officer prepares a written statement setting forth the basis for rejection of the unsolicited proposal, submits one copy to the responsible official and retains one copy in the permanent file.

(2) The responsible official prepares a letter to the proposer with copies to the receiving office and the project officer.

(d) If the decision is to support the proposal, and the proposal is in the nature of support services, the project officer shall obtain the support service approval required by the DOE Directive System prior to preparing a "justification for acceptance of unsolicited proposal" and prior to submitting the justification to the responsible official for his approval. The justification shall address each of the evaluation factors contained in FPR 1-4.909(d). The approved justification shall be appended to the procurement request.

(e) The justification shall, as a minimum, be reviewed and approved as follows (in the case of a cost shared contract, include both contractor's and Government's shares in determining dollar value):

(1) Approval levels. The following are designated as approval officials for justifications for unsolicited proposals for the indicated dollar levels:

(i) The Secretary, Deputy Secretary, or Under Secretary when the estimated value is expected to exceed $50,000,000 or where it is anticipated that the source selected will receive other contracts and/or contract modifications for later phases of the same project which, cumulatively, would total more than $50,000,000.

(ii) The cognizant Assistant Secretary, Administrator, Director, Office of Energy Research, Controller, Director, Procurement and Assistance Management, or Director of Administration when the estimated value of the contract is over $10,000,000 and up to and including $50,000,000. This authority may be delegated in writing on a case-by-case basis only when approved by the Under Secretary.

(iii) The cognizant Office Director when the estimated value of the contract is over $5,000,000 and up to and including $10,000,000. This may be delegated in writing on a case-by-case basis to a field office manager or a project manager. Each such delegation shall be concurred in by the Director, Procurement and Assistance Management or his designee.

(iv) The cognizant Office Director or designee, when the estimated value of the contract is not expected to exceed $5,000,000, in accordance with existing procurement policies and procedures.

(v) Exceptions. The Secretary, Deputy Secretary, or Under Secretary may retain approval authority on any specifically designated unsolicited proposals regardless of dollar value. The cognizant Assistant Secretaries, Administrators, Director of Energy Research, Director

Procurement and Assistance Management, Director of Administration, or Controller may retain approval authority on specifically delegated unsolicited proposals under $10,000,000.

(2) The retention of authority described above shall be signed by the appropriate retaining official and placed in the official contract file.

(f) Concurrence on justifications prior to approval shall be obtained from the Senior Program Official or his designee and the Senior Procurement Official, Headquarters, or his designee, in excess of $5 million; Counsel in excess of $1 million, or such lower amount as Counsel may determine; and the designee of the Senior Procurement Official, Headquarters, in excess of $500 but less than $5 million.

(g) Field offices are required to promptly submit all unsolicited proposals to Headquarters for processing. Absent any specific delegation, only designated Headquarters organizations are authorized to concur in and/or approve justifications for acceptance of unsolicited proposals. For those programs where the acceptance of unsolicited proposal authority has been formally delegated to a field office, justifications for acceptance of unsolicited proposals which exceed the dollar limit of the Head of the Procuring Activity's (HPAs) contracting authority or $5,000,000, whichever is less, shall be submitted with HPA recommendations to the cognizant Headquarters program office for approval as if it were initiated at Headquarters.

§9-4.910 Methods of procurement.

(a) When an unsolicited proposal has received a favorable technical evaluation, and has met all of the requirements, and when the required justification for acceptance of unsolicited proposals has been approved, the subject matter of the proposal may be procured from the proposer.

(b) The proposal constitutes the basis for negotiation and any further technical or business information shall be considered to supplement, amend, or revise the original proposal. Formal RFPs and RFQs shall not be used to obtain additional information needed for the negotiation of contracts.

§9-4.912 Interagency coordination.

(a) If the effort proposed by an unsolicited proposal is not within the mission of DOE, the proposal, with the prior written approval of the proposer, may be referred to another agency whose mission indicates potential interest in the unsolicited proposal. The proposer will be notified of the referral.

(b) An unsolicited proposal may propose activities that are also of interest to other agencies. In such cases, with the prior written approval of the proposer, interagency proposal evaluation will be initiated. If found acceptable, an agency may either write a separate contract or jointly fund the program with another agency having a collateral interest.

§9-4.913 Limited use of data.

The submitter may mark the unsolicited proposal with a legend restricting the disclosure and use of data in the proposal. Subpart 9-3.150 sets forth the policies and procedure pertaining to the marking and handling of proprietary data and privileged business information. DOE regulations with regard to the avoidance of organizational conflicts of interest (see Subpart 9-1.54) shall apply with regard to the making of awards on the basis of unsolicited proposals, the administration of contracts, or other arrangements resulting from such awards, and any evaluation of proposals which DOE decides to have made outside the Government by the contractor organizations operating and managing DOE facilities, including the competitive relationship, if any, between the proposer and the prospective outside evaluator. In addition, if the proposal under consideration expressly indicates that only Government evaluation is authorized and evaluation outside the Government is nevertheless desired, the proposer should be advised that DOE may be unable to give full consideration to the proposal unless the proposer consents in writing to having the proposal evaluated outside the Government.

§9–4.950 Notice of program interest.

(a) The notice of program interest can be used to stimulate the flow of unsolicited proposals. Each program office may publish periodically a listing of broad, general, technical problems and areas needing investigation.

(b) The notice should contain, but is not limited to, the following:

(1) A number assigned by the program office for control and reference purposes;

(2) A brief description of the broad, general, technical program or areas needing investigation (generally 50 words or less).

(3) Restrictions, if any, as to who may submit proposals.

(4) A contact (name and telephone number) within the program office or division, where additional information may be obtained.

(5) An expiration date, as needed.

(6) A statement that DOE reserves the right to support or not to support any or all proposals in whole or in part.

(7) As appropriate, a statement that DOE assumes no responsibility for any costs associated with specific proposal preparation. Except, where applicable, DOE will pay its allocable share of bid and proposal expenses as provided for in the FPR and DOE-PR.

(8) The number of proposal copies required and address of the receiving office to which proposals should be mailed.

(9) A reference that detailed information concerning contracting policy and procedures is contained in the DOE-PR, copies of which are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(c) The content of the notice should be consolidated for publication at the responsible official level and should be in the format that best reflects the needs of a specific office, e.g., letter, booklet, bulletin, or related documents.

(d) The notice should be distributed widely. It may be distributed to industry, associations, including small business associations, schools, colleges and universities, appropriate professional and scientific journals, other DOE offices, as well as individuals and organizations that request copies on a one-time basis. Copies of the notice are to be sent to the Senior Procurement Official, Headquarters.

(e) The submission of innovative methods, approaches or ideas is not to be restricted to only those problems or technical areas published in the notice of program interest.

§9–4.951 Cost participation.

Subpart 9–4.59, which outlines DOE's cost participation policy, shall be followed in determining the extent to which DOE will participate in the cost for the proposed effort.

§9–4.952 Patents.

Policies and procedures on patents, data, and copyrights are contained in §9-9.

§9–4.953 Responsible prospective contractors.

Notwithstanding the decision to accept an unsolicited proposal, organizations and individuals are subject to the policies concerning the responsibility of prospective contractors set forth in Subpart 9–1.12.

§9–4.954 Unsolicited proposals for commercial demonstrations.

(a) When a received document otherwise qualifies as an unsolicited proposal, but its substance is generally known and may be obtained without restriction by formal competitive solicitation or program opportunity notice, or its substance closely resembles that of a pending formal competitive solicitation or program opportunity notice, DOE's policy of obtaining competition applies.

(b) Unsolicited proposals for nonnuclear energy demonstration activities not covered by existing formal competitive solicitations or program opportunity notices should be prepared using the information requirements of §9–4.5702–5 as a guideline, may request federal assistance or participation and shall be subject to the cost sharing provisions of §9–4.59.

(c) The responsible program official shall assign a project officer and such other personnel as necessary to evaluate each unsolicited proposal, and to recommend whether the proposal should be supported. Unsolicited proposals for demonstration projects will be evaluated in accordance with:

(1) the Federal support criteria set forth in §9–4.5702–3(a) through (h);

(2) the evaluation criteria set forth in §9–4.5704(c); and

(3) the evaluation criteria set forth in §9–4.909.

Subpart 9-4.10 Architect-Engineer Services

§9-4.1000 Scope of subpart.

This subpart contains DOE policies and procedures for the procurement of professional architect-engineer services by contract. Architect-engineer services are defined in §9-1.5403(e) and further defined in FPR 1-4.1002(c).

§9-4.1001 General policy.

Pursuant to FPR 1-4.1001, it is the policy of the DOE to publicly announce all requirements for architect-engineer services, and to negotiate contracts for architect-engineer services on the basis of demonstrated competence and qualification for the type of professional services required at fair and reasonable prices.

§9-4.1002 Definitions.

The term "discussions" includes telephone conversations, exchange of correspondence, or interviews. The term "interview," as used in FPR 1-1.1003-7(b)(9), Note 63, means "discussions" as defined above.

§9-4.1003 Public announcements.

To ensure the broadest publicity concerning DOE's interest in obtaining architect-engineer services, a notice of intention to contract for architect-engineer services shall be prepared and published for each procurement of architect-engineer services, in accordance with the requirements of FPR 1-1.1003-3(c) and (d) and 1-1.1003-7(b)(9).

§9-4.1004 Selection.

§9-4.1004-1 Establishment of architect-engineer evaluation boards.

Architect-engineer evaluation boards will be used for the selection of professional architect-engineer services when the estimated cost of the contract is $500,000 or more. Except as provided by this subpart, the use of architect-engineer evaluation boards shall be governed by the general policies and procedures contained in FPR 1-4.1004-1 and 1-4.100-2 and the policies concerning the selection of such contractors by board process contained in internal DOE Directives. These policies and procedures are also applicable to the selection of Architect-Engineers for procurements of less then $500,000. However, less formal procedures and practices may be followed, depending upon the circumstances in each particular selection, at the discretion of the selecting official. The Source Selection Official, as designated in §9-3.805-50, shall establish an architiect-engineer evaluation board and select the contractor. When the evaluation board completes its functions, it shall prepare a report, including its recommendations, and submit it along with the solicitation, selection criteria, weights, and other information and documents, as may be requested, to the Source Selection Official and through the Senior Procurement Official, Headquarters, or his designee when the Source Selection Official is with Headquarters. The Senior Procurement Official, Headquarters, or designee shall arrange for appropriate Headquarters review of the report and prepare an action memorandum to the Source Selection Official for his consideration in making his selection.

The evaluation board's duties will ordinarily include preparation of the public announcement and development of evaluation criteria, based upon architect-engineer services requirements established by the appropriate DOE program and staff organization; development of evaluation criteria weighting; review and evaluation of Standard Forms 254 and 255; review and evaluation of information from other sources, such as appraisals of performance on previous contracts awarded to the architect-engineer firm; development of additional information requirements and conduct of discussions with firms selected for further consideration; determination of ranking of the firms evaluated; preparation of the evaluation board report and presentation of the board's findings, or recommendations, to the selecting official.

The public announcement covering the requirement for architect-engineer services, criteria and relative weightings, as developed by the evaluation board, shall be submitted to the Senior Procurement Official, Headquarters, or designee for appropriate review and comment prior to issuance of the announcement, where it is a Headquarters' selection or requires Headquarters' review and approval of the contract action. Commerce Business Daily announcements shall be prepared in accordance with FPR 1-1.10.

§9-4.1004-3 Evaluation criteria.

Contracting Officers or architect-engineer evaluation boards shall apply the evaluation criteria contained in this subsection, as appropriate, and any special criteria developed for individual selections. When special and additional criteria are to be used, they shall be set forth in the public announcement required by §9-4.1003, and a written justification for their use shall be placed in the DOE file maintained for the project.

(a) General qualifications, including:

(1) Reputation and standing of the firm and its principal members;

(2) Experience and technical competence of the firm in comparable work;

(3) Past record in performing work for DOE, other Government agencies, and private industry, including projects or contracts implemented with no overruns; performance from the standpoint of cost including cost overruns (last 5 years); the nature, extent, and effectiveness of contractor's cost reduction program; quality of work; and ability to meet schedules including schedule overruns (last 5 years) (where applicable);

(4) The volume of past and present workloads;

(5) Interest of company management in the project and expected participation and contribution of top officials;

(6) Adequacy of central or branch office facilities for the proposed work, including facilities for any special services that may be required;

(7) Geographic location of the home office and familiarity with the locality in which the project is located:

(b) Personnel and organization.

(1) Specific experience and qualifications of personnel proposed for assignment to the project, including, as required for various phases of the work:

(i) technical skills and abilities in planning, organizing, executing, and controlling;

(ii) abilities in overall project coordination and management; and

(iii) experience in working together as a team;

(2) Proposed project organization, delegations of responsibility and assignments of authority;

(3) Availability of additional competent, regular employees for support of the project, and the depth and size of the organization so that any necessary expansion or acceleration could be handled adequately;

(4) Experience and qualifications of proposed consultants and subcontractors; and

(5) Ability to assign adequate qualified personnel from the proposed organization (firms own organization, joint-venture organizations, consulting firms etc.) including key personnel and a competent supervising representative.

(c) Additional (or special) criteria developed for the specific project shall be considered and evaluated as may be appropriate.

§9-4.1004-50 Collection of data on architect-engineer firms.

DOE offices that regularly procure architect-engineer services shall collect and maintain current qualifications and performance data files on architect-engineer firms, including information on their past experience on various types of construction projects. Normally, Standard Form 254, Architect-Engineer and Related Services Questionnaire, shall be used for this purpose. Information from other sources, such as appraisals of performance of previous projects awarded to the firm, may also be included in the files.

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§9-4.1004-51 Evaluation of qualifications and performance data.

(a) After the notice of intention to contract for architect-engineer services has been published and the date for submission of the standard forms has passed, the evaluation board and/or the selecting official shall review and evaluate the Standard Form 254 and the Standard Form 255, where applicable, submitted in response to the public announcement, and other Standard Forms 254 on file in the procuring office. Consideration should be given to requesting submission of a Standard Form 255 by qualified firms which fail to respond to the public announcement to assure adequate competition. Based on this evaluation, no less than three firms shall be selected for the purpose of holding discussions. It is not necessary to hold discussions with any firm that fails to submit a Standard Form 255, where required.

(b) Normally, only those firms which are compatible with the size and complexity of the job requirements should be considered for discussions; that is, for a small, relatively simple job, firms whose resources and qualifications are far in excess of the job requirements should not be considered, and where size and simplicity of the project permit, consideration should be limited to the geographic area of the project.

(c) Every opportunity and encouragement shall be given to small business and socially and economically disadvantaged firms. Toward this end, groups that propose to form a joint venture or engage the services of small consulting firms for portions of the effort shall be given full consideration by the evaluation board and the selection official of their combined qualifications.

§9-4.1004-52 Conducting discussions.

After three or more firms have been selected in accordance with §9-4.1004-51, discussions shall be held with these firms regarding anticipated concepts and the relative utility of alternative methods of approach to furnishing the required services. These discussions may be used to obtain additional qualification, performance, and management data, and other information needed to properly apply the evaluation criteria and evaluate the firms under consideration.

§9-4.1004-53 Use of requests for supplemental information.

(a) Firms indicate their general interest in providing services by annual submittal of Standard Form 254; and indicate specific interest in providing services for a particular project, in response to the public announcement, by submittal of Standard Form 255 (and Standard Form 254 if not previously submitted). Supplemental information may be solicited as a means of initiating the discussion phase of the architect-engineer selection process. This may be particularly appropriate for the larger or more complex projects where sufficient qualification and performance data are not available from the Standard Forms 254 and 255, and additional information beyond that already furnished is needed to apply the selection criteria and evaluate and rank the firms. Firms should not be requested to furnish the same information previously submitted on Standard Forms 254 and 255, nor should they be requested to submit preliminary designs, plans and drawings, except in appropriate circumstances involving design competitions.

(b) Requests for supplemental information shall not request firms to submit price proposals. Such requests can be used only to obtain information that will enable DOE to select the best qualified contractor.

(c) When a request for supplemental information is made, some wording should be included to identify it with the discussion phase of the selection process, similar to the following: "As a result of our evaluation of material on file with this office and the SF's 254 and/or 255 submitted in response to Public Announcement ________, we have selected your firm for further consideration for selection and award of a contract to perform the architect-engineer services which are described below. The principal purpose of this request is to obtain additional specific qualification and performance data concerning your firm."

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§9-4.1004-54 Selection of most highly qualified firm for negotiation.

Upon completion of discussions and evaluation of the firms that were selected for discussions, the board shall recommend to the selecting official, in order of preference, based upon the criteria in §9-4.1004-3 and any special criteria included in the public announcement, no less than three firms deemed to be the most highly qualified to provide the services required. The Standard Form 255 submitted by firms with which written or oral discussions were held should be retained in the selection file; all other Standard Forms 255 may be discarded 90 days after award. The selecting official shall then select the firm determined to be most highly qualified. Should the firm selected be other than that ranked highest in qualifications by the evaluation board, the selection official shall provide complete documentation of his decision which shall become part of the contract file.

§9-4.1004-55 Late submission of qualification and performance data.

The submissions requested and received as part of the architect-engineer selection process differ in substance from proposals received for other types of procurement. Consequently, the policies and procedures contained in FPR 1-3.802-1, FPR 1-3.802-2, and §9-3.802-1 concerning the consideration of late responses are not applicable to proposals submitted under the provisions of this subpart §9-4.10.

§9-4.1005 Negotiation procedures.

The Contracting Officer shall attempt to negotiate a contract with the firm designated by the selecting official at a compensation which he determines is fair and reasonable to the Government. If the Contracting Officer is unable to negotiate a satisfactory contract with the designated firm at a price he considers fair and reasonable to the Government, negotiations with that firm should be formally terminated. Negotiations should then be undertaken with the second most qualified firm as designated by the selecting official. Failing accord with the second firm, negotiations should be held with the next firm, and this procedure shall be continued until a satisfactory contract has been negotiated. If the Contracting Officer is unable to negotiate a contract with any of the selected firms, additional firms shall be selected in accordance with §9-4.1004, as appropriate, and negotiations shall continue in the manner described above.

§9–4.1005–3 Independent Government estimate.

Prior to the initiation of negotiations, the Head of the Procuring Activity or designee shall develop an independent Government estimate of the cost of the required architect-engineer services based on a detailed analysis of the costs expected to be generated by the work. Consideration shall be given to the estimated value of the services to be rendered, and to the scope, complexity, and nature of the project. The independent Government estimate shall be revised as required during negotiations to reflect changes in or clarification of the scope of the work to be performed by the architect-engineer. On construction projects, a fee estimate based on the application of percentage factors to project cost estimates of the various segments of the work involved may be developed for comparison purposes, but such a cost estimate shall not be used as a substitute for the independent Government estimate.

§9–4.1005–4 Architect-engineer's price proposal.

The Contracting Officer shall request the selected architect-engineer firm to submit its price proposal with supporting cost or pricing data in accordance with FPR 1–3.807–3 and 1–3.807–4. Revisions of the price and supporting cost or pricing data may be made as required during negotiations to reflect changes in or clarification of the scope of the work to be performed by the architect-engineer or findings derived from preaward audits conducted pursuant to FPR 1–3.809.

§9–4.1005–5 Contract price.

The Contracting Officer shall negotiate a price considered fair and reasonable based on a comparative study of the independent Government estimate and the architect-engineer's proposal. Significant differences between elements of the two figures and between the overall figures shall be discussed and the Contracting Officer shall ascertain the reasons therefor.

§9–4.1005–6 Record of negotiation.

Promptly at the conclusion of each negotiation, a memorandum setting forth the principal elements of the negotiation shall be prepared in accordance with the requirments of FPR 1–3.811, for use by the reviewing authorities and for inclusion in the contract file. The memorandum shall contain sufficient detail to reflect the significant considerations controlling the establishment of the price and other terms of the contract.

§9–4.1005–50 Exemption from limitations on fee for architect-engineer services.

Under the authority of section 602(d)(13) and (20) of the Federal Property and Administrative Services Act of 1949, as amended, the six percentum fee restriction shall not impair or affect contracts for architect-engineer services. This provision applies only to those former AEC functions and those of BPA now being performed by DOE.

§9–4.1006 Limitation on contracting with architect-engineer firms for construction work.

See §9-1.54 and FPR 1-4.1006.

Subpart 9-4.11 Procurement and Contracting for Government-wide Automated Data Processing Equipment, Software, Maintenance Services, and Supplies

§9-4.1100 Scope of subpart.

This subpart implements and supplements FPR 1-4.11.

§9-4.1103 Procurement authority.

(a) All DOE procurement requests which are required to be submitted to GSA should be sent, in quadruplicate, to the Senior Procurement Official, Headquarters, or designee who will then transmit two copies to GSA.

(b) All solicitation documents which are required to be submitted to GSA should be sent, in quadruplicate, to the Senior Procurement Official, Headquarters.

(c) Contract documents which are required to be submitted to GSA should be sent, in triplicate, to the Senior Procurement Official, Headquarters.

§9-4.1103-4 Automatic data processing fund.

The provisions of §9-5.55, Purchase or Lease Determinations, shall be complied with prior to the submission of an inquiry to GSA concerning the possible use of the automatic data processing fund. The Office of the Controller will make the determination that funds are not readily available within the agency.

(b) The Senior Procurement Official, Headquarters, after consultation with the Office of the Controller and other appropriate Headquarters offices, shall ask the GSA for its determination after (1) the procuring office has complied with the provisions of §9-5.55 and the cognizant Senior Program Official, Headquarters, approves the need for the equipment but determines that it cannot provide the necessary funds; and (2) the Office of the Controller has determined that the procuring office has complied with the internal directives dealing with data processing equipment matters in the areas of the Controller's responsibilities and that funds are not available within DOE.

(c) Where GSA makes the determination that the ADP fund will be used, the Senior Procurement Official, Headquarters, after consultation with the Office of the Controller and other appropriate Headquarters offices, will negotiate the necessary arrangements with GSA concerning such matters as the reimbursement of the fund and the lease of the equipment from GSA.

Subpart 9-4.50—Multiple Awards—Phased Procurements

§ 9-4.5000 Scope of Subpart.

Some projects lend themselves to the use of multiple phase parallel contracts. The basic decision in regard to the use of multiple awards for phased procurements will be made by the program office based on technical, schedule, and cost considerations. In the first phase, more than one contractor may undertake a design effort. For the second and suceeding phases, one or more contractors may then be selected from the preceding phase's participants. Since there is an important selection decision to be made at the end of any phase, explicit evaluation and selection procedures will be made known to the contractors prior to competitive selection for succeeding phases.

§ 9-4.5001 RFP provisions.

Where multiple awards for phased procurements are contemplated, requests for proposals (RFPs) for the initial phase should include:

(a) Notice that the initial negotiated contract will be for Phase I only; however, the Government reserves the right to require, a proposal(s) for additional phases of the project as defined in the provisions of the RFP.

(b) If appropriate, notice that competitions on subsequent phases will be restricted to the Phase I contractor(s).

(c) Evaluation and qualification criteria should not ordinarily be restricted to Phase I consideration only, but rather should be designed to assure that selected offerors have the requisite technical, managment, and financial capacity to compete for and perform all phases.

(d) A requirement that each contractor submit a proposal to perform subsequent phases. Instructions for proposal submission and the evaluation criteria to be used in the selection of contractor(s) for subsequent phases will be provided to the Phase I contractors, by letter(s), as early as possible and at least 90 days prior to the date for submission of proposals.

(e) A requirement for each Phase I, or subsequent phase, contractor to submit a comprehensive report covering actual and projected accomplishments under the present phase. This information will be used in addition to the proposal and the Government's assessment of contractor performance in the evaluation and selection process for subsequent phases. The report should, as a minimum, address the technical, schedule, and cost aspects of the phase of work now under contract.

§ 9-4.5002 Evaluation.

(a) The contracting officer or other source selection officials as appropriate, shall establish an evaluation team sufficiently in advance of the Phase II proposal due date. The evaluation team shall consist of a chairman from the program office and representatives of procurement and other DOE programmatic or functional areas as appropriate. Counsel will be included as a non-voting advisory member of the evaluation team as deemed appropriate.

(b) The evaluation team will develop the evaluation criteria and proposal instructions to be furnished to the contractors. The purpose of the evaluation is to select that or those companies which best satisfies the DOE requirements for successful completion of the project. The evaluation shall consider such factors as technical, price, programmatic and other requirements. The evaluation process shall be accomplished in an impartial, equitable, comprehensive, and timely fashion to assure the selection of one or more organizations, which offer the best possibility for successful performance, cost and other factors considered. It is contemplated that the initial phase of multiphase parallel contracts awarded under these procedures will be performed in the same timeframe so that a single competitive evaluation and selection can be accomplished at one point in time. Accordingly, the contracts should contain provisions permitting the Government to synchronize contractor Phase I performances through acceleration or deceleration, as is appropriate, to achieve simultaneous completion of the Phase I activities by all firms under consideration. A thorough and detailed evaluation shall be completed so as to provide the basis on which the best selection can be made.

Subpart 9-4.51 Special Research Contracts with Educational Institutions

§9-4.5100 Scope of subpart.

This subpart sets forth policies and procedures applicable to the negotiation and administration of Headquarters-designated special research contracts (SRCs) for basic research with educational or other not-for-profit institutions. These policies and procedures should also be followed for Headquarters-designated contracts for applied research with educational institutions and for educational and training activities with educational or other not-for-profit institutions. The policy of reimbursing only DOE's share of actual costs up to a ceiling should be reflected in all contracts with educational institutions. The procedures in this subpart regarding acceptance of unsolicited proposals from educational institutions and use of the special research contracts may be used only when the annual DOE support does not exceed $1,000,000. If the annual DOE support exceeds $1,000,000, or a determination is made under the provisions of PL 95-224 that a grant or cooperative agreement is to be used as the instrument for providing support regardless of the dollar amount, then a special research contract may not be used. If the annual DOE support exceeds $1,000,000, and a contract is determined to be the instrument to provide such support, an appropriate type contract will be used in accordance with FPR 1-3.4, with clauses as prescribed in §9-7 and FPR 1-7 and the coverage of §9-4.5108.

§9-4.5101 Definitions.

(a) "Headquarters-designated contract" means a special research contract which results from an authorization to a field office from a Headquarters office to enter into or continue such a contract on the basis of an approved research proposal.

(b) "Contractor" means the educational or not-for-profit research organization which enters into a contract with DOE for the performance of specified research.

(c) "Research proposal" means a request by an institution for support of a research project, together with a detailed description of the project and its relationship to DOE's program, and detailed information as to background and experience of principal investigators, facilities, and environment of the institution, and cost and cost-sharing arrangements, if any.

§9-4.5102 General.

The DOE, by statute, is permitted to participate in research programs that are related to atomic and other forms of energy.

§9-4.5103 Research program objectives.

(a) Under sections 31 and 31a of the Atomic Energy Act of 1954, as amended, DOE is directed to exercise its powers in such manner as to insure the continued conduct of research and training activities and to assist in the acquisition of an ever-expanding fund of theoretical and practical knowledge in the following fields:

(1) Nuclear processes;

(2) The theory and production of atomic energy, including processes, material, and devices related to such production;

(3) Utilization of special nuclear material and radioactive material for medical, biological, agricultural, health, or military purposes;

(4) Utilization of special nuclear materials, radioactive material, and processes entailed in the utilization or production of atomic energy or such material for all other purposes, including industrial and commercial uses, the generation of usable energy and the demonstration of advances in the commercial or industrial application of atomic energy;

(5) The protection of health and the promotion of safety during research and production activities; and

(6) The preservation and enhancement of a viable environment by developing more efficient methods to meet the nation's energy needs.

§9–4.5104 Other objectives.

(a) Headquarters-designated special research contracts are entered into by negotiation under the authority of section 31c of the Atomic Energy Act of 1954 and section 302(c)(5) of the Federal Property and Administrative Services Act of 1949. In planning, negotiating, and administering such contracts, the objectives are to:

(1) Assure a continuing flow of new knowledge in fields related to the responsibilities of DOE;

(2) Respect the traditions of the contracting institution and encourage the quest for new knowledge without restrictions on scientific initiative, to the extent compatible with the laws and the protection of the public interest;

(3) Provide reasonable levels of support which will increase the national capability in energy fields and enable the contracting institution to strengthen its research programs in areas of interest to DOE; and

(4) Maintain effective contact with the scientific community so that:

(i) Scientists and students will be encouraged to expand their interests in fields of importance to DOE;

(ii) The scientific strength of the country can be brought to bear more effectively on DOE problems;

(iii) The DOE will be continuously aware of developments of value to its activities in the academic communities; and

(iv) An adequate supply of suitably trained scientists will be available for employment to meet energy program needs.

(b) The contractor is responsible for conducting the research and is expected to carry out the project or projects in a manner consistent with the agreed-upon objectives and requirements. These include the obligation to comply with applicable laws and regulations. The contractor is generally expected to follow its normal business practices and to use its existing accounting system.

§9–4.5105 Unsolicited research proposals.

Unsolicited proposals for DOE assistance may be initiated by scientists interested in doing research. If DOE desires to solicit research proposals, the solicitation procedures in §9–4.58 or other existing procurement solicitation procedures will be used. Prior to submitting proposals, the interested scientist, at his or her inititive may discuss the project informally with DOE. Following such discussions, the proposal should be submitted in accordance with FPR 1-4.9 and §9–4.908.

§9–4.5106 Selection, preparation, and award of research contracts.

§9–4.5106–1 General.

In order to maintain a comprehensive and well-integrated research program, evaluation of research proposals and selection of educational institutions to conduct scientific research is centralized in Headquarters. However, field offices may be assigned responsibility for handling the final arrangements and nontechnical administration of such contracts.

§9-4.5106-2 Responsibilities.

(a) The program office interested in the particular research is responsible for evaluating the technical aspects of the proposals. The program office must determine that the proposal has sufficient technical merit and program value in comparison to other available proposals to justify providing support. This includes judgments as to the merit of the proposed research objectives, the probability of achieving the objective(s), the capabilities of the researchers, and how the proposals will specifically promote the objectives in §9-4.5103 and §9-4.5104. The program office also reviews the proposer's requested cost and other estimates to determine the reasonableness, the propriety, and the advisability of proceeding with the project. Specifically, Senior Program Officials or their designees at Headquarters are responsible for:

(1) Selecting and approving research proposals and determining the amount to be funded;

(2) Documenting the rationale for funding in accordance with (a);

(3) Assuring that the statement of work is clear and complete;

(4) Providing a copy of the documents prepared in (2) and (3) to the field office;

(5) Reviewing the items in the proposal budget or itemized account of the proposed work, and, if necessary, requesting the assistance of the appropriate field office;

(6) Determining the ownership of property;

(7) Reviewing and following the technical progress of the work;

(8) Providing contractors with the technical guidance and direction as may be required to meet broad program objectives; and

(9) Keeping the field offices fully informed of technical correspondence and discussions with contractors that may have contractual or nontechnical administrative implications.

(b) Field offices are responsible for the consummation of contracts with the institution in accordance with directives from the program office, and for administering and making payments under such contracts. Specifically, field offices are responsible for:

(1) Finalizing and executing the contract (where necessary, obtaining further instructions from the program office);

(2) Administering the contract in accordance with their terms and conditions and making payments thereunder; and

(3) Providing technical and administrative assistance requested by program officials.

§9-4.5106-3 Review of research proposals.

(a) If, in the judgment of the program office, an appraisal from representatives of the scientific community is required, reviewers may be selected on the basis of their familiarity with either the field of research or the competence of the investigator. See also §9-3.150-4.

(b) Occasionally, the program office may find it necessary to obtain additional information from the research institution or to visit the site. In some cases, the comments, assistance, or participation of staff members of the appropriate field office will be requested.

(c) At the time it reviews a research proposal, the sponsoring program office shall review the prospective contractor's budget or itemized account of the proposed work and activities and the materials, equipment, and facilities involved, for the purpose of reaching mutual understanding of the estimated cost of the research and the other major aspects of the contemplated contract. Questions about the cost elements that require further investigation may be referred to the appropriate field office when the contract is authorized.

(d) When reviews are conducted by representatives who are not Government employees, the policies for avoidance of organizational conflicts of interest in §9-1.5402 shall be followed.

§9-4.5106-4 Compensation for personal services of professional staff.

Compensation for personal services of professional staff must be in accordance with Office of Management and Budget Circular A-21, revised. The certification required by Appendix C of §9-16.5002-1 fulfills the certification requirement of section K of OMB Circular A-21 for the special research contract.

§9-4.5106-5 Notice of selection or rejection.

The program office shall notify the proposer of the decision to fund or reject the proposal. In the event of a decision to fund, this notification shall advise: (a) that the proposal has been selected for funding subject to completion of a satisfactory contract; (b) which field office will negotiate and execute the contract; and (c) that DOE assumes no obligation until a contract has been executed. A copy of the notice of acceptance or rejection shall be sent to the field office concerned. The notice shall indicate the basis for rejection and shall constitute DOE's record of action for the files. If the proposal is accepted, a justification shall be prepared in accordance with §9-4.5106-2.

§9-4.5106-6 Selection of field office.

(a) When the program office has determined that a proposal will be funded, a field office will be requested to make the final arrangements with the institution concerned. Usually the field office geographically nearest to the research institution will be selected, but occasionally other factors such as existing contractual relationships and location of the research project will make the selection of some other field office desirable.

(b) Traineeship agreements under the nuclear science and engineering traineeship program are exempt from the policy in (a) and shall continue to be assigned to the Oak Ridge Operations Office. Research contracts with foreign educational institutions shall be assigned to the Chicago Operations Office.

(c) Any transfers of assignments between field offices should be accomplished when the particular contract is next renewed or otherwise modified.

§9-4.5106-7 Information to be furnished to field offices.

The sponsoring program office shall provide the field office with an authorizing directive early enough (usually four weeks) to permit timely consummation of the contract before the work is scheduled to start. The following shall be furnished:

(a) A copy of the detailed proposal and any modifications;

(b) Copies of correspondence with the research institution that are pertinent to the completion of the negotiation or that have some specific significance as to the preliminary review of arrangements made with the institution; and

(c) An authorizing directive (generally Form DOE-799, Procurement Request) which:

(1) Authorizes the execution of a specific type of contract for a specified term, with DOE support limited to a specified amount or a specified percentage of costs up to a specified support ceiling;

(2) Summarizes the background of the proposal and any pertinent discussion not reflected in the papers attached to the memorandum;

(3) Indicates the extent to which the scope of the work proposed has been approved;

(4) Indicates the principal investigator and other necessary details;

(5) Determines the availability of legal authority to transfer title to property and indicates the total estimated cost of the research and other major aspects of the contract, by reference to the proposal or otherwise;

(6) Indicates whether title to property to be acquired under the contract is to be vested in DOE or the contractor;

(7) Indicates whether restricted data or other classified information is likely to be used or developed in the course of the work and such classification and security determination as may be appropriate;

(8) Indicates directions for special reports, if any;

(9) Gives such additional information as may assist the field office in negotiating the contract; and

(10) Designates the appropriate organizational unit and individual in the program office that will have technical cognizance over the work under the contract.

§9-4.5106-8 Changes in scope and level.

After a contract has been authorized by the program office but prior to execution of the agreement, the field office shall not approve any significant change in technical scope, funding, specified result, performance, principal investigator, or other major aspect of the work without prior approval of the program office.

§9-4.5106-9 Notification of contract execution.

Promptly after execution of a contract, the program office shall be notified of such action.

§9-4.5107 General.

An outline of a standard form for special research contracts for research performed in facilities owned or controlled by the contractor (as distinguished from Government-owned or Government-controlled facilities), is set forth in §9-16.5002-1. This document is intended to provide a vehicle by which research tasks can be accomplished with a minimum of administrative effort. It is, therefore, important that such contracts be written so as to assure the complete understanding of the parties as to the job to be performed and the financial and administrative details connected therewith. Of special consideration is the nature of research contracting as contrasted to the procurement of supplies and activities of a production nature. Wide latitude in the conduct of research by the institutions is generally desirable and the standard contract forms are designed to permit such latitude in the establishment of the rights and obligations of the parties.

§9-4.5107-1 Special research contracts.

(a) The special research contract outlined in § 9-16.5002-1, is generally used for basic research with educational institutions when the annual DOE support under the contract does not exceed $1,000,000. It provides that DOE's monetary obligation will be a specified amount, which is referred to as the support ceiling, or a lower adjusted amount (referred to as the cumulative support cost) if actual cost chargeable to DOE during the total period of the contract are less than expected. The ceiling on DOE's monetary support will be determined and established as a support ceiling at the outset of the initial contract period. The total contract period of performance should be established based upon the estimated period of performance necessary to accomplish the research effort. If available funding is less than that needed to fully fund the effort, the available funding will be provided as the cumulative Government cost as defined at Article A III (b) of § 9-16.5002-1 with the remainder of the funding subject to the availability of funds. In such circumstances the standard Special Research Contract format provided at § 9-16.5002-1 should be revised at Article II—The Period for Performance to indicate the period of time for which the available funding is estimated to suffice and at Article A-III to show the additional funding to be provided subject to the availability of funds.

(b) If the parties agree to extend the contract for an additional period or periods of performance, the ceiling on DOE's funding (Government ceiling) will be increased to reflect any increased support by reason of the extended period or periods. The costs chargeable to DOE (Government cost) will be reported for each pertinent period of the contract specified in Appendix A (generally an annual period) in accordance with paragraphs (b), (c), and (d) of this section, and the Government cost determined for each such period will be accumulated for all periods of performance, as will the Government ceiling.

(1) The monetary obligation to the contractor will not exceed the cumulative Government cost or the accumulated Government ceiling, whichever is less.

(2) Upon termination, or expiration of the total period of performance, the contractor will refund to DOE, or make such other disposition as the Contracting Officer may direct, any funds advanced in excess of the cumulative Government cost incurred under the contract. Payment shall be made in consideration of the contractor's performance of research activities described in the contract and in accordance with the provisions of the contract.

(3) The contractor shall have the right to discontinue performance of research under the contract, upon written notice to the Contracting Officer, at any time when or after the total costs chargeable to DOE equal or exceed the cumulative Government cost or the Government ceiling whichever is less.

(4) Certain deviations in performance and other actions require the Contracting Officer's approval as stated in §9-4.5112-4. Among other approval requirements, the contractor must obtain the Contracting Officer's approval to incur costs for items set forth in Article A-II(a), during the pertinent period stated in Appendix A, in excess of 110 percent of the total estimated cost specified in Article A-III for the specific period. In those cases in which there is to be proportionate sharing of costs, the percent of the costs to be borne by DOE will be set forth in Article A-III of the agreement (see paragraph (d) of this section).

(c) The contractor will be required to furnish a certified statement (within three months after the expiration of the pertinent contract period set forth in Appendix A - and at the termination of or expiration of the contract), signed by an authorized official, showing the total cost, Government cost, and contractor's contribution, if any, for the prior contract period. The format for this report is found in §9-16.5002-1, Appendix C.

(d) It is expected that in many cases the contractor will propose to contribute to the cost of the research work. Such contribution shall be set forth in Appendix A of the contract, either as items under (b) or (c) of Article A-II which will be contributed solely by the contractor without charge to DOE, or as a proportionate cost-sharing agreement in Article A-III which will provide that the contractor will charge DOE only a specified percentage of the actual cost incurred for items under (a) of Article A-II.

(1) Proposed contractor contributions should ordinarily be listed under (b)(1) of Article A-II when: (i) the contribution is that of the principal investigator or other senior personnel who are likely to be involved in the research work to the same extent whether their cost is included in or excluded from proportionate cost sharing; (ii) the proposed contribution to the work is being paid for by a third party, e.g., personnel or equipment, the cost of which is being reimbursed under another contract or grant from public or private sources; and (iii) the proposed contribution does not involve any cash expenditure by the contractor.

(2) Only those items, the cost of which is to be charged to DOE or proportionately shared by the parties, should be listed under Article A-II(a). Proportionate sharing of the cost of items under Article A-II(a) should be provided for only when the contractor agrees to pay a specified percentage of the cost of all such items, and when such sharing is expected to be of financial benefit to DOE.

(3) In those cases in which there is to be proportionate cost-sharing, the contractor should generally be encouraged to continue the same sharing ratio throughout the life of the contract so as to provide for ease of administration and to avoid difficulties in determining proper charges to DOE. When the contract provides for proportionate cost-sharing, it should be understood that DOE will pay only the specified percentage of the actual cost of items under Article A-II(a) incurred during the pertinent period specified in Appendix A, up to a maximum of 110 percent of the estimated Government cost set forth in Article A-III for the pertinent period unless otherwise specifically approved by DOE and subject to the Government ceiling set forth in Article III.

(e) If the contractor proposes to contribute the cost of the principal investigator(s) on the project and requests that the contribution be excluded from A-II(b), the contributed time or effort should be shown in A-II(c). The contractor would not be required to maintain records regarding the amount of effort contributed by the principal investigator, and the contractor would not be required to certify, in accordance with Appendix C of the contract, the amount of effort contributed by the principal investigator. The principal investigator may be included in Article A-II(a) for purposes of obtaining reimbursement of costs during the summer months, and excluded from Article A-II(a) for the academic year if the contractor proposes to contribute the costs for that period. The contract generally will not require the contractor's commitment that any particular amount of time or effort by the principal investigator(s) or other personnel will be devoted to the work. In the event a proposed contractor contribution is included in Article A-II(b)(1), the contract should reflect the nature and extent of the contractor's intent to contribute the item, and the contractor shall maintain records adequate to permit DOE to determine the extent of the contribution. The contractor shall certify, in accordance with Appendix C of the contract, the extent to which the item or items under Article A-II(b)(1) have been contributed. Government-owned property to be procured, fabricated, or furnished under Article IV or Article B-IX of the contract and other Government-furnished equipment, supplies, materials, or services should be excluded from Article A-II(a) and listed under Article A-II(b)(2).

(f) If the special research contract outlined at § 9-16.5002-1 is to be used for not-for-profit organizations other than educational institutions, Article B-XXIX, Determination of Support Cost, should be revised to provide that the cost principles at FPR 1-15.2, 1-15.6, or 1-15.7 as supplemented or modified by DOE-PR 9-15, will be used, depending on the organizational characteristics of the contractor, in determining actual cost or the contract may be revised at the direction of the cognizant Headquarters office to provide for a lump-sum payment to the contractor in consideration for its performance of particular research at a specified level of effort.

(g) The special research contract outlined in §9-16.5002-1 may also be used to fund research at educational institutions in foreign countries; however, at the discretion of the cognizant Headquarters or field office, the outline of §9-16.5002-1 may be revised to provide for a lump-sum payment to the foreign institution in consideration of its performance of particular research at a specified level of effort, and to limit approval requirements to those consistent with the nature of the support to the foreign institution. All such contracts with foreign institutions should provide that any unused funds available to the foreign institutions at the end of the contract shall be used in a renewal period, returned to DOE, or otherwise disposed of, in accordance with DOE instructions.

OMB CONTROL NO.: 1901—0021, paragraph (c).

§9-4.5108 Personal property.

§9-4.5108-1 Transfer of title to equipment to nonprofit educational or research institutions.

(a) In accordance with Public Law 95-224, DOE has discretionary authority to vest in nonprofit institutions of higher education or nonprofit organizations whose primary purpose is the conduct of scientific research, without further obligation to the Government or on such other terms and conditions as may be appropriate, title to equipment purchased or fabricated with contract funds where it is deemed to be in furtherance of the objectives of DOE.

(b) It is deemed to be in the furtherance of the objectives of the DOE, pursuant to PL 95-224, to vest in those educational and nonprofit institutions title to equipment purchased or fabricated with contract funds for research. This will promote the progress of scientific research, reduce the amount of expense and unnecessary labor due to the necessity for maintaining records, transporting, or storing such property which is often unsuitable for any other use. Program officials will impose such terms or conditions as they determine to be appropriate in individual cases.

(c) Contracts with nonprofit institutions of higher education or nonprofit organizations whose primary purpose is the conduct of scientific research, shall provide for transfer to contractors of title to equipment having an acquisition cost of less than $1,000 and purchased or fabricated with contract funds available for the conduct of basic and applied research, provided prior approval of the acquisition has been obtained from the Contracting Officer. This prior approval may be in the form of an approved budget which calls out the equipment to be acquired, either on a line-item basis or for clearly defined classes of items, or by other means, as long as the Contracting Officer can determine that the proposed acquisition is essential to the performance of the contract. Title to such equipment shall vest in the contractor upon acquisition or as soon thereafter as feasible.

(d) For equipment having an acquisition cost of $1,000 or more, contracts with such institutions shall provide that title to equipment purchased with contract funds available for the conduct of basic and applied research, shall vest in the institution upon acquisition or as soon thereafter as feasible without further obligation to the Government, unless it is determined not to be in furtherance of the objectives of DOE and is provided for in the contract. The contract may reserve the right of the Government to transfer title of equipment costing $1,000 or more per unit to the Government or to a third party named by the Government, at any time prior to final payment under the contract.

(e) When title to equipment is vested in the institution as provided in this subsection, the institution may not charge for any depreciation, amortization, or use with respect to such equipment under any Government contract, or cooperative agreement, or any subcontract under a Government contract.

(f) The determination to vest title in the institution under this subsection will be provided by the cognizant program office on the Procurement Request Form, DOE-799, or other appropriate document.

(g) In addition to the authority referred to in paragraph (a) of this subsection, the Atomic Energy Act of 1954, as amended, authorizes DOE to vest title to items of equipment and other personal property in a contractor when the transfer serves a nuclear programmatic purpose. A programmatic determination to transfer title to the institution will be provided by the cognizant program office and made a part of the official contract file.

§9-4.5108-2 Acquisition of excess Government personal property.

(a) The utilization of certain items of excess Government personal property by educational institutions is encouraged in the interest of conserving funds otherwise designated for similar items of property in existing research contracts or agreements with such institutions. Excess Government personal property includes all types of equipment and materials, used or new, which are owned by the Federal Government and are no longer needed by the holding Federal agency, but have additional useful life.

(b) Consistent with GSA regulations, excess personal property may be furnished to a contractor (with or without transfer of title) upon authorization by DOE, provided a determination is made that acquisition will result in a reduction in the cost to the Government of the contract. This procedure will not normally be used for the acquisition of general purpose equipment (e.g., desks, typewriters, air conditioners).

(c) Contractors may obtain information concerning the availability of certain kinds of equipment or materials by requesting the cognizant DOE office to include them on the GSA mailing list. When an item of equipment or material is selected, the contractor should reserve it by notifying the cognizant GSA office and confirming the reservation in writing. Availability is usually on a first-come, first-serve basis, but GSA will give preference in a competing situation to those agencies which do not vest title to property in the contractor. The contractor should then submit a Standard Form 122, Transfer Order Excess Personal Property, to the cognizant DOE office, accompanied by a written justification of need, including the estimated cost of acquisition (e.g., packing, shipping, installation, rehabilitation, etc.), signed by the principal investigator and an authorized administration official. The written justification shall contain a statement as to whether or not the contractor desires title to the property under the authority of the Atomic Energy Act and subparagraph 9-4.5108-1(g). If the acquisition is approved, the DOE office shall forward the SF-122 to the appropriate GSA office with a notation as to whether or not the DOE intends to vest title to the property in the contractor. A copy of the approved SF-122 with the notation regarding the vesting of title shall be returned to the contractor. When the property is received, the contractor shall forward to the DOE office a receipted copy of the SF-122 which lists the items of property.

(d) In those instances where the contractor's acquisition of title has been approved by DOE, title to the property shall pass to the contractor when the receipted SF-122 is received by the DOE office, pursuant to Article B-IX(b), Property Items, of §9-16.5002-1. Contract funds may be used to pay for all costs of packing, transportation, installation, rehabilitation, and maintenance, if required.

(e) In those instances where the contractor did not desire title or where the cognizant DOE office has determined that title to the excess property should remain in the Government, the property will be handled as Government property in accordance with Article B-IX of §9-16.5002-1.

§9-4.5108-3 Reports.

Excess property acquired from other Government agencies or from GSA and provided to institutions under the authority of §9-4.5108-2, above, will be included in the report required by FPMR 101-43.4701(c).

§9-4.5109 Reporting requirements.

OMB CONTROL NO.: 1901—0021.

§9-4.5109-1 Purpose of reports.

Research reports from contractors are necessary to show the progress achieved under projects receiving DOE funding. In many instances, the research reports are of value in making information available to scientists working on closely allied problems.

§9-4.5109-2 Notice of Energy R&D Project.

Immediately after a contract is negotiated, a Notice of Energy R&D Project, DOE Form 538, which summarizes the purpose and scope of the project should be sent by the contractor to the Contracting Officer, the Program Manager, and the Technical Information Officer. Copies of the form may be obtained from the Contracting Officer. Annual updates are required.

§9-4.5109-3 Progress reports.

Progress reports should briefly describe the scope of the investigations undertaken and the significant results obtained. They should also explain any significant differences between the actual level of activity (expressed in the various categories of person-months, facilities procured, travel performed, etc.) and that contemplated in the contract.

§9-4.5109-4 Technical reports.

Technical reports, reprints, and articles prepared for publication during the period covered should be listed with bibliographic references. Reprints of all such material not previously submitted should be appended and material contained in them need not be duplicated in the report.

§9-4.5109-5 Special reports.

Special reports or additional progress, status, or topical reports may be requested through the Contracting Officer or may be submitted as deemed necessary by the contractor. For example, brief status reports may be requested when developments are of immediate interest or when a significant point in the investigation has been reached. The value relative to the costs incurred in providing special reports must be considered when requesting any additional reports.

§9-4.5109-6 Final report.

A final report summarizing the entire investigation shall be required from the contractor upon expiration of each contract. Satisfactory completion of a contract will be contingent upon the receipt of this report. The final report should follow the outline agreed upon for progress reports or, when a project has extended over a long period of time, the final report may refer to previously submitted technical reports for details and may be a synopsis of the entire project. Manuscripts prepared for publication should be appended.

§9-4.5109-7 Summary and distribution of reports.

(a) A table summarizing the various types of reports, time for submission, number of copies and distribution is set forth below. The distribution and schedule of reports shall be as prescribed in this table, unless the authorizing program office specifies otherwise. Frequently, an annual progress report and a 200-word summary are sufficient for fundamental research, but additional reporting may be required in many cases. These reports are prepared by the contractor and submitted to the appropriate field office for distribution. The field office shall transmit these reports with a covering memorandum indicating: (1) the other DOE offices receiving the documents; (2) the name of the contractor; and (3) the contract number. Each copy of the documents should bear the contract number.

DISTRIBUTION AND SCHEDULE OF DOCUMENTS

		Number of copies for			
Type	When Due	HQ Field Office	HQ Program Office	TIC ext. Oak Ridge	HQ Patents OGC
1. Summary: 200 words on scope and purpose (S.I.E. Form)	At start of initial contract and each renewal period	1	3		
2. Renewal proposal	Not later than 3 months nor earlier than 6 months before contract expires	2	4		
3. Annual progress reports	With renewal proposal, but bound separately	2	4	2	
4. Other progress reports, brief topical reports, etc. (Desired when significant results develop or when work has direct programmatic impact)	As deemed necessary by investigator or as specifically requested by appropriate Hq. office	2	4	2	
5. Conference papers	Same as 4 above	2	4	2	
6. Final report	Three months after completion of the work.	2	2	2	1

(b) The DOE contract administrator shall inform the contractor which types of documents are to be transmitted to TIC. For each document so identified, the contractor shall send the additional copy to the contract administrator for transmittal to TIC, accompanied by one copy of DOE Form 427.

(c) The report shall be prefaced by an informative abstract of no more than 200 words.

(d) §9-4.5109-4 requires the listing of technical reports, articles, and reprints and the appendage of reports not previously submitted.

§9-4.5110 Dissemination of results.

§9-4.5110-1 Prompt dissemination.

Prompt dissemination of research results to the scientific community is encouraged. Publication in open literature is recognized as the normal and most desirable means for reporting the findings of unclassified fundamental research. Although DOE reserves the right to utilize, and have others utilize, to the extent it deems appropriate, the reports resulting from research contracts, DOE will attempt, to the maximum extent reasonably practicable and consistent with the Government's best interest, to permit the institutions and the authors to effect their own publication in established technical journals.

§9-4.5110-2 Publication.

(a) Contractors are urged to publish results through normal publication channels. As a further inducement, page charges or other printing assessments for publishing articles in recognized scientific journals, or any additional costs incurred in obtaining a limited supply of reprints of articles, will be considered an appropriate budget item under contracts receiving DOE support where:

(1) The document reports work funded by the Government;

(2) The charges are levied impartially on all research papers published by the journal, whether by non-Government or by Government authors;

(3) Payment of such charges is in no sense a condition for acceptance of manuscripts by the journal;

(4) The journals involved are not operated for profit; and

(5) The author does not receive an emolument for the research paper.

(b) A credit line should be included in any such publication to indicate that the research has been funded, in whole or in part, by DOE. A patent check shall be made in advance of release to the public of any material prepared for publication.

(c) The contractor or principal investigator may publish contract data if approved by DOE in accordance with the provisions of the Patent Rights clause, §9-9.107-5(a) (long form) or §9-9.107-6 (short form).

§9-4.5111 Extension of contracts.

OMB CONTROL NO.: 1901—0021.

§9-4.5111-1 Renewal proposals.

(a) Where additional time, beyond the current expiration period, is required to continue or complete the work, the contractor should submit six copies of a renewal proposal to the DOE field office that has administrative jurisdiction of the existing contract, not later than four months nor earlier than six months before the date of expiration of the contract. If a renewal proposal has not been received four months prior to the contract expiration date, the Contracting officer shall determine if a renewal proposal is to be submitted and take necessary action for contract close-out or processing the renewal proposal as appropriate.

(b) The renewal proposal should outline and justify a program and budget for the succeeding year, showing in detail the estimated cost of the project, together with an indication of the items for which the contractor is requesting reimbursement or proportionate cost-sharing, the percentage of any such costs to be shared by the contractor, and any items to be contributed solely by the contractor. It should include the same type of information as that required for initial proposals, or reference this information to the extent contained in earlier proposals. Any contemplated change in program or scope for the ensuing period should be justified and explained clearly, and the cost estimates and other items should be based upon past experience. Any deviation from the contract which has not received DOE approval should be explained in detail.

(c) The renewal proposal should include a financial statement of the work under the current contract including:

(1) Total project costs for the current period to date, indicating the amount chargeable to DOE;

(2) An estimate of the total costs to be incurred during the remainder of the current contract period, indicating the amount chargeable to DOE;

(3) The anticipated difference, if any, between the accumulated support cost at the end of the current contract period and the cumulative Government ceiling; and

(4) A footnote to show the estimated amount of outstanding commitments for property at the end of the current contract period.

§9-4.5111-2 Evaluation of requests for renewals.

(a) Requests for renewals are evaluated by the appropriate program office in the light of:

(1) Progress reports submitted by the contractor;

(2) Research results published in scientific media;

(3) Field visits to the research site by technical personnel;

(4) Contractor's performance and progress;

(5) Continued relevance to DOE's mission;

(6) Scientific and technical merit of the research and a comparison of the relative importance of the project in relation to other research proposals, proposed and ongoing; and

(7) Availability of funds.

(b) Requests for renewals generally follow the same process of review and evaluation of technical aspects and funding, preparation, and execution of the contract, and administration as a new project, although less use would normally be made of outside consultants.

(c) Contracts authorized by program offices shall not be extended for a new term or on an interim basis or modified in scope without specific prior authorization from the appropriate program office.

§9-4.5111-3 Authorization to renew.

(a) When a determination has been made to extend a contract, the sponsoring program office shall provide the field office with notification four weeks in advance of expiration to permit an orderly completion of the extension before the expiration date. The authorizing directive should include generally the same type of information provided in the authorization of a new contract, including pertinent information concerning any changes in scope of work, level of funding, scheduled dates for completion of certain phases of work, target dates for submission of reports, etc. The directive will describe the results of the prior funding period and what is expected to be accomplished in the new funding period.

(b) An authorization to renew a special research contract shall state the estimated total cost of items to be included under Article A-II(a) of Appendix A for the renewal period, the percentage of such costs to be reimbursed by DOE, and the amount of new funds authorized to increase the Government ceiling.

(c) The field office that has administrative jurisdiction of an existing contract may extend the term of an existing contract without authorization from the cognizant program office, provided that:

(1) Any such extension does not provide for an increase in DOE's monetary obligation under the contract;

(2) The scope of work is not revised by such extension;

(3) Such extension is necessary to permit completion of the scope of work authorized by Headquarters, including preparation of required reports; and

(4) Any such extension will not be for a period in excess of 90 days.

§9-4.5112 Administration.

§9-4.5112-1 Responsibilities of program offices.

(a) Technical representatives of program offices will make, to the extent practicable, periodic site visits. A written summary of the results of all visits will be prepared and filed promptly. Copies of such reports shall be forwarded to the field office whenever they contain information of administrative interest or other information pertinent to the assigned responsibilities of the field office. These visits are for the purpose of:

(1) Determining that the research is being performed in accordance with the contract;

(2) Ascertaining that schedules are being met to insure timely submission of interim and final reports;

(3) Determining whether the project has adequate facilities, equipment, and scientific, technical, and other personnel for the specified research;

(4) Ascertaining that any equipment requested for purchase is not reasonably available within the institution;

(5) Assisting the principal investigator to clarify specific technical aspects as work progresses;

(6) Exploring future budget requirements, but without making any commitments as to future funding level; and

(7) Obtaining information regarding the status of work for administrative and technical purposes of the program sponsor.

(b) Program offices will provide guidance to the field offices in connection with:

(1) Any contractor requests for approval of proposed deviations or other actions requiring DOE approval which are brought to their attention by field offices, or which have been brought to their attention through site visits, progress reports, or other agreements or contacts with the contractor;

(2) Increasing the obligational authority under any special research contracts;

(3) Whether or not required contractor reports are satisfactory; and

(4) The renewal or close-out of contracts. Instructions should be provided at least four weeks prior to the expiration date of a contract.

§9-4.5112-2 Responsibilities of field offices.

Field offices are responsible for the following:

(a) Assisting Headquarters program offices as requested, in carrying out the functions set forth in §9-4.5112-1;

(b) Performing the necessary administrative functions required by the terms of the contract, and making payments in accordance with the contract;

(c) Bringing to the attention of the appropriate Headquarters offices:

(1) Any contractor requests for approval which are required by the contract;

(2) The upcoming expiration date of a contract whenever required instructions on renewal or close-out have not been received on a timely basis;

(3) Any request by a contractor to revise an established stipulated salary support amount, and any notification by a contractor that it is reducing the charges under the stipulated salary support procedure (see §9-4.5106-4(c)); and

(d) Determining whether to use Public Law 95-224 or the Atomic Energy Act of 1954, as amended, as the authority for vesting title to personal property in the contractor when authorized to do so pursuant to §9-4.5106-7(c)(6). Public Law 95-224 shall be used to the maximum extent consistent with the authority contained therein.

§9-4.5112-3 Payments under special research contracts.

(a) Payments will be made to contractors under a special research contract in accordance with its provisions (see Article B-XI of §9-16.5002-1). The letter of credit procedures, as provided for in Treasury Fiscal Requirements Manual, Part 6, Chapter 2000, shall be used to the maximum extent feasible when the total of DOE contracts and agreements with advance financing at an institution provides for a continuing annual level of support of $120,000 or more. When the total DOE contracts and agreements with advance financing provide for a continuing annual level of support of less than $120,000, DOE shall make advance payments covering the first 90 percent of the amount of the new funds as set forth in Article A-III(b) of the contract. The field office may revise Article B-XI of §9-16.5002-1, regarding the timing and amounts of advance payments, in accordance with the following provisions.

(1) The advance payments may be made at times and in amounts determined by the field office, provided that no single payment will exceed 45 percent of the new funds as set forth in Article A-III(b) of the contract for the pertinent period except on the basis of a request from the contractor evidencing that a specified amount is required in connection with expenditures or commitments made under the contract.

(2) The timing and amounts of payments should be determined on the basis of limiting the amount of advances to the extent feasible, consistent with effective and efficient administration and performance of the research, for the purpose of slowing the rate of cash withdrawals from the Treasury and thereby decreasing the financing costs to the Federal Government.

(3) In determining the timing and amounts of payments, consideration should be given to funds already available to the contractor, the expected expenditures under the contract, any information from the contractor regarding the need for funds, and the administrative cost of additional payments.

(b) If the contract is to be extended for an additional period of performance with additional funding, there may be paid at the time of execution of the extension, the amount withheld from the expiring period which, when added to the payments already made, does not exceed the new funds set forth in Article A-III(b) for the expiring period. The final payment under both of the procedures referred to in paragraph (a) of this section shall be made on the basis of determinations by the Contracting Officer that: (1) the required reports are satisfactory; (2) the research was performed in accordance with the provisions of the contract; (3) an additional payment is required to reimburse for all costs chargeable to DOE; and (4) an appropriate patent clearance has been obtained. If necessary in making these determinations, the Contracting Officer should obtain advice from the technical personnel of the program office based upon their visits to and other contacts with the research project during the contract period as well as their technical review of the report. It is expected that the annual progress and final reports and the contractor's certified cost statements will provide an adequate basis for making the required determinations. If the determinations cannot be made on the basis of a consideration of the reports, visits to and other contacts with the research project during the contract period, and the contractor's certified statements, the Contracting Officer may invoke the audit provision of the contract. In the event the Contracting Officer determines that the contractor has not satisfied the contractual undertakings, appropriate steps shall be taken to protect the Government's interests.

§9-4.5112-4 Approval of deviations in performance and other specified actions.

(a) Contractors should inform the cognizant field office as soon as possible of contemplated deviations and other proposed actions which require DOE approval. Specific deviations and actions include the following:

(1) A change of the principal investigator, co-investigator, or other key people as might be named in the contract, or continuation of the research work for any one period in excess of three months without direction by an approved principal investigator. The principal investigator may increase or decrease the amount of effort which he devotes to the project without obtaining the Contracting Officer's approval; however, a representative of the institution shall consult with the appropriate Headquarters program representative if the principal investigator plans to, or becomes aware that he will, devote substantially less effort to the work than anticipated in Article A-I. The purpose of such consultation will be to determine what effect, if any, the anticipated change will have on the research work and what modification to the contract, if any, may be appropriate.

(2) A change in the phenomenon or phenomena under study, i.e., broad category of the research under the contract, requires the specific written approval of the Contracting Officer; ordinarily such changes, if approved by the Contracting Officer, will be accomplished through a new contract or modification. The contractor may change the specific objectives in the research work described in the contract, provided it gives the Contracting Officer prompt notification of such changes; and the contractor may continue to follow the new objectives while DOE determines whether it wishes to continue the program under the changed approach. Significant changes in methods or procedures employed in performing the research should be reported in the first technical progress report issued subsequent to the changes.

(3) Acquisition of an item of equipment not itemized in the contract, the cost of which is $1,000 or more. Prior approval is required. Approval is not required if the equipment is merely a different model of an item listed in the contract. If plant and capital equipment funds are provided for the acquisition of equipment, with title to be vested in the Government, the total cost of such equipment shall not exceed the amount provided for such equipment unless prior approval has been obtained.

(4) Purchase of any general-purpose equipment, such as office equipment or furniture, air conditioning, automatic data processing equipment, etc., not specifically provided for in Appendix A of the contract. Prior approval is required.

(5) Incurring costs for items set forth in Article A-II(a), during the pertinent contract period stated in Appendix A, in excess of 110 percent of the total estimated cost specified in Article A-III. Charges to DOE for any such costs incurred with approval of the Contracting Officer shall also be subject to the limitations of Article III.

(6) Any proposed foreign travel (defined as any travel outside of Canada and the United States and its territories and possessions).

(7) Expenditures for domestic travel if such expenditures exceed the amount shown in Article A-11 (a) for such travel by $500 or by 25 percent, whichever is greater. Prior approval is required.

(8) Acquisition of excess personal property.

(9) Such other items as, in the judgment of the program office or the field office, in specific cases need to be separately identified in the contract. (When plant and capital equipment funds are provided for the acquisition of Government property, the program offices shall re-

quire that such funds be used only for acquiring the equipment designated in the contract, unless prior approval has been obtained.)

(b) The field office will present (in any manner considered appropriate) all such requests for approval to the cognizant program office for consideration, and will issue such authorizations and modifications under the contract as are necessary and appropriate.

(c) Contractors may be requested by the field office to provide such statements of the project's financial and program status as are believed necessary for considering requests for approval.

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§9-4.5112-5 Auditing.

(a) As a part of the management of the research program accomplished through the contracts, auditing of participating contractors shall be initiated by the Contracting Officers administering the contracts. The purpose of this audit program is to corroborate that the participating institutions are properly using the funds and personal property provided by the contracts, and to point up any changes needed in the arrangement or in related administrative requirements in order to further the effectiveness of the contracts in accomplishing their intended programmatic research purposes. In addition to the general objectives stated above, the principal specific objectives in the audits of special research contracts should be to determine: (1) that the amounts as submitted in the contractor's certified statement are accurate and were incurred in connection with the work; (2) that satisfactory documentary evidence is available in support of the costs incurred; (3) that DOE approval was obtained where required; and (4) that the proportion of total cost charged to DOE is in accordance with the percentage stipulated in the contract.

(b) The review of special research contracts will be made on a selective basis with the selected sample including all special research contracts where the Contracting Officer requested that an audit be performed pursuant to the provisions of §9-4.5112-3(b).

(c) In the event of termination prior to the expiration date of a special research contract, unless the costs incurred by the contractor are relatively small or can be otherwise adequately corroborated, an audit should be made to determine the nature of the costs and other relevant data for use in arriving at a termination settlement.

(d) While audit is not a prerequisite to payment under a contract, the Contracting Officer, before authorizing final payment, may request an audit to determine whether the charges to the contract are proper. If any such audits result in findings which may be of value to program offices in their determinations regarding selection and renewal of research projects, such findings should be made available to the cognizant program office.

§9-4.5112-6 Security.

As a general rule, investigators should not need access to classified information in the conduct of basic research funded by DOE. When, in the judgment of the principal investigator, information is developed which should be classified, he will notify the DOE field office immediately. When, in the opinion of the cognizant program office, the work moves into a classified area, prompt steps should be taken to notify the contractor and the appropriate field office.

Subpart 9–4.52 (Reserved)

Subpart 9-4.53 Resolution of Measurement Differences Concerning Source and Special Nuclear Material Transfers

§9-4.5300 Scope of subpart.

This subpart describes principles regarding the resolution of measurement differences which should be used as guides in the preparation of contracts or other agreements by DOE in which monetary payments or credits depend on the quantity and quality of source and special nuclear material.

§9-4.5301 Contract, lease, or agreement.

(a) Every such contract, lease, or agreement should contain:

(1) A description of the material to be transferred;

(2) A provision specifying the method by which the quantity and quality are to be measured and reported;

(3) A provision specifying the procedures to be used in resolving any differences arising as a result of such measurements;

(4) A provision providing for the use of an umpire to settle unresolved differences in the analytical samples; and

(5) A provision specifying in detail which party shall bear the costs of resolving a difference and what consitutes such costs.

(b) The provisions providing for resolution of measurement differences must be such that resolution is always accomplished while at the same time minimizing any advantage one party might have over the other.

Subpart 9–4.54 Contracts and Subcontracts Utilizing Special Nuclear Material

§9–4.5400 Scope of subpart.

This subpart sets forth policies for furnishing special nuclear material, for fabricating end items using special nuclear material, and for conversion or scrap recovery of special nuclear material.

§9–4.5401 Definition.

For purpose of this subpart, special nuclear material means "uranium enriched in the isotope U^{233}, U^{235} and plutonium other than PU^{238}."

§9–4.5402 Policies.

(a) Special nuclear material will be furnished by DOE for use under fixed-price contracts and subcontracts, at any tier, which call for the production of special nuclear products, including fabrication and conversion, for Government use. (The contractor or subcontractor must have the appropriate license or licenses to receive the special nuclear material. The Nuclear Regulatory Commission is the licensing agency.)

(b) Contracts and subcontracts for fabrication of end items using special nuclear material generally shall be of the fixed-price type. Cost-type contracts or subcontracts for fabrication shall be used only with the approval of the Head of the Procuring Activity, and this approval authority shall not be redelegated.

(c) Contracts and subcontracts for conversion or scrap recovery of special nuclear material shall be of a fixed-price type, except as otherwise approved by the Head of the Procuring Activity.

Subpart 9-4.55 Multiyear Procurement

§9-4.5500 Scope of subpart.

(a) This subpart sets forth policies and procedures applicable to competitive procurements on a fixed-price basis for known requirements of supplies or services over a multiyear period when the total funds required are not available for the entire procurement at the time the procurement contract is executed. This subpart does not apply to long-term contracts which are fully obligated at the time of execution, or which are otherwise specifically authorized by law (e.g., section 161u of the Atomic Energy Act of 1954, as amended).

(b) The policy in §9-4.5502 shall be applied to cost-type contractor procurements.

§9-4.5501 Description of multiyear procedure.

(a) Multiyear procurement is a method for competitive contracting for known requirements for supplies or services, in quantities and total cost not in excess of planned requirements for five years set forth in approved DOE programs, even though the total funds ultimately to be obligated by the contract are not available to the Contracting Officer at the time of entering into the contract. Under this method, contract quantities are budgeted for, and financed in accordance with, the program year for which each quantity is authorized. This procedure provides for solicitation of prices based either on award of the current one-year program quantity only or, in the alternative, on the total multiyear quantities. Award is made on whichever of these two alternative bases reflects the lowest unit prices to the Government. If award is made on the multiyear basis, funds are obligated only for the first year's quantity, with succeeding years' contract quantities funded annually thereafter. In the event funds are not made available to support one or more succeeding year's contract quantities, cancellation is effected. The contractor is protected against loss resulting from cancellation by contract provisions allowing reimbursement of unrecovered nonrecurring costs considered in pricing the items subsequently cancelled.

(b) Under this procedure:

(1) Nonrecurring costs are distributed over a larger number of units, thus narrowing any price advantage of a firm already in production;

(2) There is a greater assurance of depreciation recovery for capital investment; and

(3) The competitive base is broadened with better prospects for lower prices, where firms otherwise might be unwilling or unable to compete.

§9-4.5502 Policy.

(a) The multiyear procurement method is to be used to the maximum extent consistent with the requirements of this subpart in order to:

(1) Stimulate maximum realistic competition by minimizing competitive disadvantage or disinterest in procurements involving, at least initially, substantial start-up costs or make-ready expense; or

(2) Obtain lower prices in those procurements which provide opportunity for substantial cost savings and other advantages through assurance of continuity of production or service over longer periods of time.

(b) The multiyear procurement method shall not be used:

(1) If funds covering the procurement are limited by statute for obligation during the fiscal year in which the procurement contract is executed;

(2) When the supply or service being procured is regularly produced or provided and offered for sale in substantial quantities in a commercial market reasonably available;

(3) For quantities in excess of the planned requirements set forth in, or in support of, current approved DOE program and financial plans or for periods in excess of five years; or

(4) When any one of the criteria set forth in §9–4.5503 is not present.

(c) In any multiyear procurement, it is DOE policy to consider the desirability of obtaining options to renew the contract for reasonable periods at prices not to include any nonrecurring costs such as charges for plant and equipment already amortized. In addition, where a multiyear procurement involves an initial investment in plant and equipment which will constitute an appreciable portion of the cost of contract performance, it is DOE policy to consider the desirability of reserving the right, upon payment of the unamortized portion of the plant or equipment, to take title thereto under appropriate circumstances.

§9–4.5503 Criteria for use of multiyear procurement.

All of the following criteria must be met in order to procure on a multiyear basis:

(a) Reduced unit prices can be reasonably anticipated over successive annual procurements by reason of elimination or reduction of repetitive start-up costs or contingent expenses, including such costs or expenses as preproduction engineering, special equipment or tooling, plant rearrangement, and assembly, training, or transportation of a specialized work force;

(b) There is reasonable expectation that effective competition can be obtained;

(c) There are known requirements for the supplies or services to be procured, and relatively stable production or service can be reasonably anticipated throughout the multiyear period;

(d) The design and specifications of the item or the character of the service are expected to remain relatively stable for the multiyear period; and

(e) The items being procured are not regularly manufactured and offered for sale in substantial quantities in the commercial market, except when (1) quantities to be procured by the Government represent a substantial portion of the total market and would require special manufacturing runs for all or substantially all of the Government's requirements, and (2) significant cost savings would result from multiyear procurement.

§9–4.5504 Exceptions.

Exception, by reason of some overriding consideration, from any limitation set forth in §9–4.5502(b) or from any of the criteria set forth in §9–4.5503 shall not be made unless approved by the Senior Procurement Official, Headquarters.

§9–4.5505 Method of solicitation.

Formal advertising, including two-step formal advertising, is the preferred method for use in multiyear procurement. In cases where the period of production is such that an unreasonable contingency for labor and material costs is likely to be included in the multiyear contract price, the Contracting Officer may use a provision for price escalation.

§9–4.5506 Procedure to be followed in multiyear procurement.

Solicitations shall include the information described in the following paragraphs, as appropriate.

§9–4.5506–1 Requirements.

State the requirements, separately identified by bid or proposal item in the schedule, for (a) the first program year; and (b) the multiyear procurement, including the quantities for each program year thereunder.

§9-4.5506-2 Previous competition.

When previous production procurements of the item have been made with competition:

(a) Include a provision that a price may be submitted for the total requirements of the first program year, or for the total multiyear requirements, or both;

(b) When competition in future procurements of the items would be impracticable after award of a contract covering the first program year quantity alone, and the Head of the Procuring Activity determines that, in order to eliminate the possibility of a first program year "buy-in", these provisions will be in the best interests of the Government, include provisions that a price may be submitted only for the total multiyear quantity and that prices on a single-year basis will not be considered for any purpose; or

(c) Include a provision that if only one responsive offer on the multiyear requirement is received from a responsible offeror, the Government reserves the right to cancel the solicitation and resolicit on a one-year basis by whatever procedures are then appropriate.

§9-4.5506-3 No previous competition.

When there has been no previous competition for the production of the item:

(a) Include provisions that a price must be submitted for the total requirements of the first program year, that a price may be submitted for the total multiyear quantity, or that a bid or offer on the multiyear quantity only will be considered nonresponsive; and a provision that if only one responsive bid or offer on the multiyear requirements is received from a responsible bidder or offeror, the Government reserves the right to disregard the bid or offer on the multiyear quantity and to make an award only for the first program year requirements;

(b) If the award of a contract which covered only the first program year quantity would result in a lack of competition in future procurements, particularly if there is a chance of a "buy-in" for the first program year quantity, and it is in the best interest of the Government, include provisions that a price may be submitted only for the total multiyear quantity and that prices on a single-year basis will not be considered for any purpose; or

(c) Include a provision that if only one responsive bid or offer on the multiyear requirement is received from a responsible bidder or offeror, the Government reserves the right to cancel the solicitation and resolicit on a single-year basis by whatever procedures are then appropriate.

§9-4.5506-4 Pricing – unit price.

Include a provision that the unit price of each item or service in the multiyear requirement shall be the same for all years included therein and that the portion of the cost of any plant and capital equipment amortized as a cost of performance should not exceed the ratio between the period of performance and the anitcipated useful commercial life of such plant or equipment.

§9-4.5506-5 Comparison criteria.

Provide criteria for comparing the lowest evaluated submission on the first program year's requirement against the lowest evaluated submission on the multiyear requirements.

§9-4.5506-6 Single-year and/or multiyear award.

When the solicitation permits bids or offers on either the first program year requirement, include a provision that in the event the Government determines prior to award that only the first program year quantities are actually required, the Government may evaluate bids of offers on the first program year requirement.

§9-4.5506-7 Cancellation ceiling.

Include a provision indicating whether or not cancellation ceilings are applicable to the multiyear procurement and, if appropriate, a provision setting forth a separate cancellation ceiling (on a percentage basis) applicable to each year, subject to cancellation.

§9-4.5506-8 Schedule provision.

Include a provision directing attention to the multiyear features of the solicitation, and to:

(a) The limitation of price and contractor performance clause which limits the payment obligation of the Government to the requirements of the first program year and to those of such succeeding program years as may be funded by the Government;

(b) The cancellation clause which allows the Government to cancel, by a specified date or within a specified period, all remaining program years; and

(c) The cancellation ceiling set forth in the schedule.

§9-4.5506-9 Quantity obligation.

Include a statement that award will not be made on less than the quantity stated as the first program year requirement.

§9-4.5507 Establishment and revision of cancellation ceilings.

(a) The term "cancellation," as used in multiyear procurement, refers only to the cancellation of the total requirements of all remaining program years. Such cancellation results from notification from the Contracting Officer to the contractor of nonavailability of funds for contract performance for any subsequent program year, or failure of the Contracting Officer to notify the contractor that funds have been made available for performance of the succeeding program year's requirement. For each program year except the last, the Contracting Officer shall establish a cancellation ceiling applicable to the remaining program years which are subject to cancellation. Cancellation ceilings will be lower for each succeeding program year in that such ceilings must exclude all amounts allocable to items included in prior program years. Such ceilings shall be expressed in the schedule and shall apply to all bidders alike. The reduction in the cancellation ceiling percentage for each program year shall be in direct proportion to the reduction in the quantity remaining subject to cancellation. For example, if the total nonrecurring costs are estimated at 10% of the total multiyear price and program year quantities for five years are 30, 30, 20, 10, and 10, the cancellation percentage, after deducting 3% for the first program year, would be 7%, 4%, 2%, and 1% of the total multiyear price applicable to the second, third, fourth, and fifth program years, respectively. In determining cancellation ceilings, the Contracting Officer must estimate reasonable preproduction, labor learning, and other nonrecurring costs, to be incurred by an "average" prime or subcontractor which would be applicable to and which normally would be amortized in all items to be furnished under the multiyear requirements. They include such costs as plant rearrangement, initial spoilage, pilot runs, and unrealized labor learning. They shall not include any costs of labor or materials, or other expenses, (except as indicated above) which might be incurred for production of the items subject to cancellation for each program year. The total estimate must then be compared with the base estimate of the procurement cost to arrive at a reasonable percentage figure. To perform this calculation, it is essential that the Contracting Officer obtain in-house engineering cost estimates which will identify the detailed recurring and nonrecurring costs, and indicate labor learning implications. Cancellation dates for each program year's requirements shall be established with due regard for production lead time and the date by which funding therefor can reasonably be accomplished.

(b) Original cancellation ceilings may be revised if information developed after issuance of a solicitation discloses that such ceilings are not realistic. In the case of formal advertising, such changes shall be by amendment of the invitation for bids prior to bid opening. In two-step formal advertising, discussion conducted during the first step may indicate the need for revised ceilings in step two. Negotiations with offerors in a negotiated procurement may provide information requiring a change in cancellation ceilings for all offerors, prior to final negotiation and contract award. In order to assure that all interested sources of supply are thoroughly aware of how multiyear procurement is accomplished, use of presolicitation or prebid conferences may be advisable. During such conferences the Contracting Officer should ascertain whether escalation provisions are appropriate and whether the proposed cancellation ceiling is adequate.

§9-4.5508 Funds obligation—contingent liabilities.

For each program year's requirement, funds shall be obligated to cover the quantities to be delivered thereunder.

§9-4.5509 Payment for cancellation.

In the event of a cancellation, the contractor is entitled to payment as consideration therefor, in accordance with the terms of the cancellation clause, in an amount not to exceed the cancellation ceiling.

§9-4.5510 Schedule provision limiting payment obligation.

The schedule shall contain a provision limiting the payment obligation of the Government to a monetary amount therein described as being available for contract performance. Such amount for the first program year's requirement shall be inserted by the Contracting Officer upon award of the contract and shall be modified for successive program years upon availability of funds for such years.

§9-4.5511 Termination for convenience.

In the event of a total termination for the convenience of the Government, including items subject to cancellation, the Government's obligation shall not exceed the amount set forth in the schedule as available for contract performance, plus the applicable amount established as the cancellation ceiling.

§9-4.5512 Evaluation.

(a) Evaluation of offers in a multiyear procurement involves not only the determination of the lowest overall evaluated cost to the Government for both alternatives, the multiyear procurement and the first program year's procurement; it also involves the comparison of the cost of buying the total requirement under a multiyear procurement with cost of buying the total requirement in successive independent procurements. All the factors to be considered for the various evaluations involved shall be set forth in the solicitation.

(b) In the event the Government determines, prior to award, that only the first program year's quantities are actually required, the procurement will no longer be evaluated on a multiyear basis if the solicitation permits bids and offers on either the first program year requirement or the multiyear requirements, or both, only bids or offers on the first program year requirements will be evaluated. If the solicitation does not permit the submission of prices on a single-year basis, the single-year requirement will be resolicitated.

(c) The cancellation ceiling shall not be a factor for evaluation. Unless Government administrative costs incident to annual procurement methods and contract administration can be reasonably established and supported, they shall not be used as a factor for evaluation. When administrative costs are to be used in evaluation, the dollar amount to be used shall be stated in the solicitation.

(d) Delivery destinations may be unknown for certain quantities due to the extended duration of contract performance. In such cases, destinations shall be determined on the basis of best estimates; a definite place or places shall be designated in the solicitation as the point to which transportation costs will be computed (but only for the purpose of evaluating bids or proposals); and the solicitation shall contain the notice required by FPR 1-19.202-7.

(e) When Government production and research property is provided, the use of such property may be on a rent-free basis. In this event, the solicitation shall set forth a detailed description of the procedure to be followed and the factors to be considered for the elimination of competitive advantage. The amount added for evaluation to each offeror's unit price for the first program year requirement shall also be added to his unit price for the multiyear requirements.

(f) When the solicitation requires the submission of prices on the first program year's requirement, bids or offers which submit prices on the multiyear requirements only shall be rejected as nonresponsive.

(g) When the solicitation provides for submission of prices only for the total multiyear quantity, submission of prices for the single-year quantity will be disregarded for any purpose but will not render the bid or offer nonresponsible as to any alternate multiyear submission by the same bidder or offeror.

(h) To determine the lowest evaluated unit price, compare the lowest evaluated bid or offer on the first program year alternative against the lowest evaluated bid or offer on a multiyear alternative as follows:

(1) Multiply the evaluated unit price for each item of the lowest evaluated bid or offer on the first program year alternative times the total number of units of that item required by the multiyear alternative, and then

(2) Take the sum of these products for all the items, plus the dollar amount of any administrative costs of the Government which are to be used in the evaluation, and finally

(3) Compare this result against the total evaluated price of the lowest bid or offer on the multiyear alternative.

§9-4.5513 Award.

Award shall be made to that responsible offeror whose offer, conforming to the solicitation, will be most advantageous to the Government, price and other factors considered. In no event shall award be made at an unreasonable price.

§9-4.5514 Special clauses for use in multiyear contracts.

All multiyear awards made under the multiyear procurement method described herein shall contain the clauses set forth in §9-7.

Subpart 9–4.56 (Reserved)

Subpart 9-4.57 Program Opportunity Notices for Commercial Demonstrations

§9-4.5700 Scope of subpart.

This subpart establishes procedures for the submission, evaluation, and selection for award or support of proposals offered in response to program opportunity notices (PONs) issued by DOE to accelerate the demonstration of the technical feasibility and commercial application of all potentially beneficial nonnuclear energy sources and utilization technologies.

§9-4.5701 Applicability.

This subpart applies to demonstrations performed by individuals, educational institutions, other commercial or industrial organizations, or other private entities, or by any public entities, including State and local governments, but not other Federal agencies. For purposes of this subpart, commercial demonstration projects include demonstrating technological advances and field demonstrations of new methods and procedures, and demonstration of prototype commercial applications for the exploration, development, production, transportation, conversion, and utilization of non nuclear energy resources.

§9-4.5702 Policy.

§9-4.5702-1 General.

(a) It is DOE's intent to encourage the submission of proposals to accelerate the demonstration of the technical, operational, economic, and commercial feasibility and environmental acceptability of particular energy technologies, systems, subsystems, and components. Program opportunity notices will be used to provide information concerning scientific and technological areas encompassed by DOE's program. DOE shall, from time to time, issue program opportunity notices for proposals for demonstrations of various forms of nonnuclear energy and technology utilization.

(b) Synopsis of the notice shall be published in the Commerce Business Daily prior to or concurrent with release. In addition, the notice shall be circulated directly to potentially interested individuals, private and public entities (excluding Federal agencies) and associations thereof to the maximum extent feasible. Special attention in this regard should be given to small business concerns and socially and economically disadvantaged concerns to insure that they are given every opportunity to participate in such procurements. Consideration should be given to distributing the announcement to all eligible entities which, during the preceding two years, have expressed an interest in participating in, or entering into arrangements for, commercial demonstration in the particular energy field.

§9-4.5702-2 Determination to use and approval of content.

(a) Determination to use.

(1) Before the PON is selected by the program office as the appropriate solicitation procedure, a written program determination shall be made to show that the conditions in §9-4.5702-3 exist to support the conclusion that the use of the PON procedure is both necessary and appropriate. The determination must not be merely conclusive but shall be supported by specific facts and explanations.

(2) The Senior Program Official or designee may approve the determination.

(3) The approved determination shall accompany the PON file through the preparation, concurrence, approval, and issuance phases.

(b) Approval of content.

(1) When the dollar amounts are less than SEB level, a PON may be originated at whatever level is consistent with the program objectives established by the Senior Program Official.

(2) When a source evaluation board is not required, notices may be approved by the Senior Program Official or designee after prior concurrence by Counsel.

(3) When an SEB is required, notices shall be reviewed and approved by the SEB after prior concurrence by Counsel, and the Senior Program Official, or designee.

(4) All PONs shall be issued by the cognizant Head of the Procuring Activity or designee.

§9-4.5702-3 Federal support criteria.

In determining the appropriateness of DOE involvement through the PON mechanism in any particular area of demonstration activity, consideration shall be given to the extent to which the proposed undertaking meets Federal support criteria including, but not limited to, the following:

(a) The urgency of public need for the potential results of the research, development, or demonstration effort is high, and it is unlikely that similar results would be achieved in a timely manner in the absence of Federal assistance;

(b) The potential opportunities for non-Federal interests to recapture the investment in the undertaking through the normal commercial utilization of proprietary knowledge appear inadequate to encourage timely results;

(c) The extent of the problems treated and the objectives sought by the undertaking are national or widespread in their significance;

(d) The opportunities to induce non-Federal support of the undertaking through regulatory actions, end-use controls, tax and price incentives, public education, or other alternatives to direct Federal financial assistance are limited;

(e) The degree of risk of loss of investment inherent in the research is high, and the availability of risk capital to the non-Federal entities which might otherwise engage in the field of the research is inadequate for the timely development of the technology;

(f) The research, development, and application objectives anticipated by the activities or facilities proposed, support national interests or objectives;

(g) The economic, environmental, and societal significance which a successful demonstration may have for the national fuels and energy system; and

(h) The availability of non-Federal participants to construct and operate the facilities or perform the activities associated with the proposal and to contribute to the financing of the proposal.

§9-4.5702-4 Information to be included in program opportunity notices.

Each program opportunity notice shall include:

(a) The goal of the intended demonstration effort;

(b) A time schedule for submission of, and action on, proposals:

(c) Evaluation criteria, including an indication, when determined practicable to do so, of the approximate cost and time duration contemplated for individual projects resulting from the notice;

(d) Program policy factors.

(e) An indication that additional information, consistent with the overall concepts and approaches developed in the proposal, may be required regarding the statement of work and the proposed budget (e.g., a notice that a detailed cost breakdown may be required from the proposers being considered);

(f) Such other information, terms, or conditions that shall apply to the particular program opportunity notices;

(g) A place for and manner of submission; and

(h) A late proposal provision (see FPR 1-3.802-1).

§9-4.5702-5 Information to be provided in proposals offered pursuant to program opportunity notices.

All proposals should be specific and, as a minimum, include the information set forth below:

(a) Name and address of the entity(ies) submitting the proposal;

(b) Date of preparation of submission;

(c) Type of entity(ies) (public, including State and local governments, and private, including profit and nonprofit organizations and educational institutions);

(d) Representations and certifications as specified in the notice; and

(e) Concise title and abstract of the proposed demonstration project for which assistance or participation is being sought.

(f) An outline and discussion of the proposed demonstration which shall, if applicable and to the extent possible, specifically address and reference the evaluation criteria and include:

(1) specification of the technology;

(2) proposed statement of work to be performed;

(3) description of prior operating experience with the technology;

(4) preliminary design of the demonstration plant;

(5) time tables containing proposed construction or fabrication and installation and operation plans;

(6) budget-type estimates of construction or fabrication and operating costs;

(7) description and proof of title to land for proposed site, natural resources, electricity and water supply, and logistical information related to access to raw materials to construct and operate the plant and dispose of salable products from the plant;

(8) assessment of the environmental impact of the proposed plant and plans for disposal of wastes resulting from the operation of the plant;

(9) plans for commercial use of the technology if the demonstration is successful;

(10) plans for continued use of the plant if the demonstration is successful;

(11) plans for dismantling of the plant if the demonstration is unsuccessful or otherwise abandoned;

(12) form and amount of assistance or participation being sought;

(13) form and amount of funding, or other contribution to be provided by the proposer, including proposed disposition of revenues generated; and,

(14) the extent to which the proposed expenditures would constitute permanent (nonseverable) improvement to property now owned by the Government; and proposed plans for the disposal (through acquisition by the offeror or otherwise) of any such improvements.

The information called for under this section relates primarily to a demonstration project involving the construction and operation of a "plant". In instances where the proposed project concerns a demonstration that does not involve a plant (for example, the demonstration of a process, apparatus, or device), the program opportunity notice shall state what additional information is to be submitted with the proposal;

(g) Names of the key personnel to be involved, brief biographical information, including relevant experience;

(h) A current financial statement;

(i) The period for which proposal is valid;

(j) Names and telephone numbers of proposer's primary business and technical personnel whom DOE may contact during evaluation or negotiation;

(k) Each proposal containing technical data or proprietary or business confidential information, which the proposer intends to be used by DOE for evaluation purposes only, should be marked on the cover sheet with the legend prescribed in §9-3.150-2; and

(l) Signature and title of an official of the proposing organization authorized to contractually obligate such organization.

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§9-4.5702-6 Alternate procedures for consideration of late proposals.

For PON s involving a large number of awards, consideration should be given to the use of the alternate procedures for consideration of late proposals in FPR 1-3.802-2. If the FPR 1-3.802-2 clause is considered appropriate, authorization should be obtained at a level above the Contracting Officer.

§9-4.5703 Assistance and participation.

§9-4.5703-1 Forms of assistance and participation.

(a) In providing for demonstration, DOE may utilize various forms of Federal assistance and participation. These include but are not limited to:

(1) Contracts;

(2) Grants;

(3) Loans;

(4) Incentives, including financial awards, to individual inventors;

(5) Joint Federal-industry demonstration corporation;

(6) Federal purchase(s) or guaranteed price of the products of the demonstration project; and

(7) Cooperative agreements.

(b) As a result of a PON a procurement contract, grant or cooperative agreement may be entered into. If the intended relationship is expected to be a procurement contract §9-4.57 shall be followed. If the intended relationship is expected to be a financial assistance instrument, the DOE Assistance Regulations (DOE-AR) shall be followed. Specifically, DOE-AR 233 (10 CFR 600.233) will apply if the intended relationship is expected to be a cooperative agreement. In any event, any public notice, solicitation or request for applications or proposals should indicate whether the intended relationship will be one of procurement or assistance and state that the applicable DOE-PR will govern if a procurement contract is entered into and that the DOE-AR will govern if a financial assistance instrument is utilized.

§9-4.5703-2 Cost participation.

The provisions contained in Subpart 9-4.59 outlining DOE's cost participation policy shall apply to proposals hereunder.

§9-4.5704 Method and criteria for evaluation and selection.

(a) General policy.

(1) Information contained in proposals offered in response to PONs shall be handled in accordance with the policies and procedures set forth in §9-3.150 pertaining to the marking and handling of proprietary data and privileged business information.

(2) Late proposals, modifications of proposals, and withdrawals of proposals shall be handled in accordance with FPR 1-3.802-1.

(b) Selection.

(1) When the aggregate of expected award values, plus costs shared by the contractor and/or other parties, together with later phases of the same project, is expected to meet the SEB dollar threshold, comprehensive evaluation shall be conducted by a specially constituted board which shall follow procedures and documentation requirements of the SEB Handbook modified as appropriate to conform to the solicitation process as set forth herein.

(2) When the aggregate of expected award values, plus cost shared by the contractor and/or other parties, together with the later phases of the same project is not expected to meet the SEB dollar threshold, proposals submitted in response to a PON will be evaluated by a panel which shall be appointed by the cognizant program office. The panel should utilize any of the procedures and documentation requirements of the SEB Handbook (as modified as appropriate to conform to the solicitation process as set forth herein) whenever necessary to insure the impartial, equitable and thorough evaluation of each proposal. The panel will be composed of program office and other personnel, including representatives of Procurement and Counsel and, as deemed appropriate by the appointing official, supplemented by personnel from other Government agencies. The representative of Counsel will be a nonvoting member of the panel. Personnel from DOE prime management or operating contractors may be used as advisors to the panel when their services are necessary and available as long as the approvals and procedures in §9-3.150-4 and §9-3.805-50(f) are followed.

(c) Evaluation criteria. The evaluation criteria shall be specified in the notice along with a narrative description of their relative importance. The criteria below, to the extent applicable, as well as any additional criteria stated in the program opportunity notice, shall be considered:

(1) The overall technical feasibility of the proposed effort;

(2) The contribution which the proposed effort is expected to make to DOE in carrying out its program responsibilities, including, but not limited to, solving energy extraction and storage, transportation, conversion, waste utilization, and conservation problems;

(3) The capabilities, related experience, facilities, instrumentation, or techniques which the proposer possesses and offers, and which are considered to be integral factors for achieving the objective(s) of the proposal;

(4) The qualifications, capabilities, experience, and availability of the proposed key personnel;

(5) The ability of the proposer to furnish necessary financial support;

(6) Project and financial plans for management of the activities including the adequency of proposed arrangements among all participants;

(7) Plans for involvement of the small business community;

(8) Cost realism and probable cost to the government.

(d) Program policy factors. Program policy factors are those factors which, while not appropriate indicators of a proposal's individual merit (e.g., technical excellence, proposer's ability, cost, etc.), are relevant and essential to the process of choosing which of the proposals received will, taken together, best achieve the program objectives. All such factors shall be predetermined and specified in the notice so as to notify proposers that factors which are essentially beyond their control will affect the selection process. The following are examples of possible program policy factors:

(1) It is desirable, because of the nature of the energy source, the type of projects envisioned, or limitations of past efforts, to select for award or support a group of demonstration projects with a broad or specific geographic distribution;

(2) It is desirable to select for award or support (for reasons that must be stated) projects from diverse types and sizes of proposing organizations;

(3) It is desirable to select for award or support a group of projects which represent a diversity of methods, approaches, applications, or kinds of work; and

(4) It is desirable, due to the nature of certain projects or proposing organizations, to select for award or support duplicative or complementary efforts or projects.

(e) Selection official. The selection official will be as provided in §9-3.805-50.

(f) Preliminary review.

(1) Prior to making a comprehensive evaluation of a proposal, the SEB, or the receiving office when an SEB is not required, shall determine that it:

(i) contains sufficient technical, cost, and other required information to enable comprehensive evaluation; and

(ii) has been signed by a responsible official of the proposing organization or a person authorized to obligate such organization.

(2) If the proposal does not meet these requirements, a comprehensive evaluation shall not be made. In such a case, a prompt reply shall be sent to the proposer, indicating the reason(s) for its not being selected for award or support under the PON.

(g) Comprehensive evaluation. The basic task in the evaluation and selection of proposals for award or support is to assess their relative merit in order to determine which of them offers the greatest likelihood for achievement of the program objectives stated in the notice, considering technical quality, ability of the proposer, estimated cost, and other relevant factors. Proposals which survive preliminary review shall be evaluated by an SEB or a panel, as applicable, in accordance with the criteria stated in the notice. The Source Selection Official will select proposals for support or award from the findings established by the SEB or a panel, as applicable. In this latter process, the selection official will take into account the relevant program policy factors in order to determine the mix of proposed projects which will best further specific program goals. All findings and selections are to be documented, signed and maintained to provide an adequate record of the proceedings.

§9-4.5705 Award or support.

While only those proposals which best further the needs of the program as specified in the notice will be considered for award or support, DOE may accept for award or support all, none, or any number or part of the proposals submitted.

§9-4.5706 Unsolicited proposals for commercial demonstrations.

See §9-4.954.

§9-4.5707 Optional two-step method.

Where a large number of proposals are anticipated, proposals may be limited to technical considerations with cost proposals subsequently requested from those proposers whose technical proposals are evaluated as technically acceptable.

Subpart 9–4.58 Program Research and Development Announcements.

§9–4.5800 Scope of subpart.

(a) This subpart establishes procedures for the submission, evaluation, and selection for award or support of proposals offered in response to specific program research and development announcements (PRDAs) issued by DOE to conduct research, development, and related activities in the energy field.

(b) As a result of a PRDA, a procurement contract, grant or cooperative agreement may be entered into. If the intended relationship is expected to be a procurement contract §9–4.58 shall be followed. If the intended relationship is expected to be a financial assistance instrument the DOE Assistance Regulations (DOE-AR) shall be followed. Specifically, DOE-AR 600.23[4] (10 CFR 600.233) will apply if the intended relationship is expected to be a cooperative agreement. In any event, any public notice, solicitation, or request for applications or proposals should indicate whether the intended relationship will be one of procurement or assistance and state that the applicable DOE-PR will govern if a procurement contract is entered into and that the DOE-AR will govern if a financial assistance instrument is utilized.

§9–4.5801 Applicability.

This subpart may be applied to arrangements by DOE to conduct, or participate in joint or cooperative projects for research, development, and related activities with individuals, private entities (including educational institutions, not-for-profit or nonprofit organizations, and commercial or industrial organizations), or public entities (including State and local governments, but not Federal agencies), provided, however, that the conditions set forth in §9–4.5802–1(c) exist.

§9–4.5802 Policy and prerequisites.

§9–4.5802–1 General.

(a) PRDAs are used to provide potential proposers with information concerning DOE's interest in entering into arrangements for research, development, and related projects in specified areas of interest. It is DOE's intent to solicit the submission of ideas from individuals, private entities (including educational institutions, not-for-profit or nonprofit, and commercial and industrial organizations), or public entities (including State and local governments, but not Federal agencies) which will serve as a basis for research, development, and related activities in the energy field. Furthermore, it is DOE's desire to encourage the involvement of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals in research and development undertaken pursuant to PRDAs.

(b) This mechanism is not to replace existing procurement procedures where a requirement can be sufficiently defined for solicitation under standard advertised or negotiated procurement procedures. Similarly, it is not to inhibit or curtail the submission of unsolicited proposals. However, a proposal which is submitted as though it were unsolicited but is in fact germane to an extant PRDA will be treated as though submitted in response to the announcement or returned without action to the proposer, at the proposer's option. Further, this mechanism is not to be used in a competitive situation where it is appropriate to negotiate a study contract to obtain analysis and recommendations to be incorporated in the subsequent issuance of a request for proposals.

(c) the PRDA is to be used only where:

(1) Research and development is required within broadly defined areas of interest to support program goals but it is difficult, if not impossible, to describe in any reasonable degree of detail the nature of the work contemplated because of:

(i) the multiplicity of possible approaches, within the current state of the art, available for solving the problems;

(ii) the desirability of involving a broad spectrum of organizations in seeking out solutions to the problems posed;

(iii) the expectation that many individual proposers will have unique qualifications or specialized capabilities which will enable them to perform portions of the research or development program (without necessarily possessing the qualifications to perform the entire program) so that the overall support may be broken into segments which cannot be ascertained in advance; and

(iv) the desirability of fostering new and creative solutions;

(2) Consistent with (1) above, it is anticipated that choices will have to be made among dissimilar concepts, ideas, or approaches; and

(3) It is determined that a broad range of organizations exist that would be capable of contributing towards the overall research and development goals identified in (1) above.

(d) The announcement will be synopsized in the Commerce Business Daily prior to or concurrent with release. In addition, the announcement shall be circulated directly to interested individuals, private and public entities (excluding Federal agencies), and associations thereof to the maximum extent feasible. Special attention in this regard should be given to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to insure that they are given every opportunity to participate in such procurements. The originating program office should consider distributing the announcement to all eligible entities which, during the preceding two years, have expressed an interest in participating in, or entering into an arrangement for, research or development in the particular energy field.

§9-4.5802-2 Determination to use and approval of content.

(a) Determination to use.

(1) Before the PRDA is selected by the program office as the appropriate solicitation procedure, a written program determination shall be made to show that the conditions in §9-4.5802-1(c) exist to support the conclusion that the use of the PRDA procedure is both necessary and appropriate. The determination must not be merely conclusory but shall be supported by specific facts and explanations.

(2) (Reserved)

(3) The approved determination shall accompany the PRDA file through the preparation, concurrence, approval, and issuance phases.

(b) Approval of content.

(1) A PRDA may be originated at whatever level is consistent with the program objectives established by the Senior Program Official.

(2) The PRDA content may be approved by the Senior Program Official or designee after prior concurrence by counsel.

(3) All PRDAs will be issued by the cognizant Head of the Procuring Activity or designee.

§9-4.5802-3 Information to be included.

Each PRDA shall include:

(1) A summary of the area(s) of program interest, expanded as appropriate, to include problems and objectives;

(2) A time schedule for submission of, and action on, proposals;

(3) Information to be provided in the proposals;

(4) Evaluation criteria;

(5) Program policy factors;

(6) Other information, terms and conditions which shall apply to the particular PRDA;

(7) Place for, and manner of, submission;

(8) A unique number for identification purposes;

(9) A statement notifying potential proposers that an announcement does not commit DOE to pay any proposal preparation costs and that DOE reserves the right to select for award or support any, all, or none of the proposals received in response to an announcement; and

(10) A late proposal provision (see FPR 1-3.802-1 and FPR 1-3.802-2).

§9-4.5802-4 Information to be provided in proposals.

(a) All proposals should be specific, concise, and include, as appropriate, the following information set forth below:

(1) Name and address of the entity(ies) submitting the proposal;

(2) Date of proposal submission;

(3) Identification of the PRDA (by number and title) to which the proposal responds;

(4) Type of entity(ies) submitting the proposal, whether public (including State and local governments), or private (including profit and nonprofit organizations and educational institutions);

(5) Concise title and abstract of the proposed project or effort;

(6) An outline and narrative of the proposed effort which shall, specifically address and reference the evaluation criteria and to the extent possible, include:

(i) objectives of the proposed effort;

(ii) detailed plan of approach (procedures, concepts, limitations, timetables of key milestones, and expected accomplishments or research results);

(iii) internal management controls applicable to conduct of the work;

(iv) scope and methods of management support;

(v) details concerning previous or ongoing work performed in the category(ies) of research proposed, or in related fields;

(vi) form and amount of funding, or other contribution, if any, to be provided by the proposer;

(vii) location where the work will be performed;

(viii) cost schedule detailing estimated costs for manpower and other resources (GSA Optional Form 60, or equivalent); and

(ix) projected date of completion of the proposed effort;

(7) Resumes of key personnel to be involved which include a description of relevant experience and associated dates;

(8) A current financial statement;

(9) Period for which the proposal is valid (if other than that stipulated in the announcement);

(10) Names and telephone numbers of proposer's primary business and technical personnel whom DOE may contact during evaluation; and

(11) Signature and title of an official of the proposing organization(s) authorized to obligate such organization(s).

(b) Each proposal containing proprietary data or privileged business information which the proposer intends to be used by DOE for evaluation purposes only should be marked on the cover sheet with the notice prescribed in §9-3.150-2.

(c) If the proposer is a small business concern, it shall so certify in its proposal. Other representations, certifications and acknowledgments which may be required by law or regulation shall also be submitted as specified in the announcement.

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§9-4.5803 Cost participation.

The provisions of DOE's cost participation policy in §9-4.59 shall apply as applicable to proposals submitted hereunder.

§9-4.5804 Method and criteria for evaluation and selection.

(a) General policy.

(1) Information contained in proposals offered in response to PRDAs shall be handled in accordance with the policies and procedures set forth in §9-3.150 pertaining to the marking and handling of proprietary data and privileged business information.

(2) Late proposals, modifications of proposals, and withdrawals of proposals shall be handled in accordance with FPR 1-3.802-1. For PRDAs involving a large number of awards, consideration should be given to the use of alternate procedures for consideration of late proposals in FPR 1-3.802-2. If the FPR 1-3.802-2 clause is considered appropriate, authorization should be obtained at a level above the Contracting Officer.

(b) Selection panel. A panel appointed by the cognizant program office will evaluate proposals submitted in response to a PRDA. The panel will be composed of program office and other DOE personnel, including representatives from Procurement, Counsel, and, as deemed appropriate by the appointing official, supplemented by personnel from other Government agencies. The representative of Counsel will be an ex-officio (nonvoting) member of the panel. Personnel from prime management or operating contractors may be used as advisors to the panel when their services are necessary and available as long as the approvals and procedures in subparts 9-3.150-4 and 9-3.805-50(f) are followed.

(c) Evaluation criteria. The evaluation criteria shall be specified in the announcement along with a narrative description of their relative importance. The following items are illustrative of the elements which may be considered as evaluation criteria:

(1) Overall technical feasibility of the proposed effort;

(2) Adequacy and relevance of the proposed research plan, including validity tests as related to the proposed goals;

(3) The capabilities, related experience, facilities, instrumentation, or techniques which the proposer possesses and offers, and which are considered to be integral factors for achieving the objective(s) of the proposal;

(4) The qualifications, capabilities, experience and availability of the proposed key personnel;

(5) The ability of the proposer to furnish necessary financial support;

(6) Project and financial plans for management of the activities including the adequacy of proposed arrangements among all participants.

(7) Plans for involvement of the small business community.

(8) Cost realism and probable cost to the government.

(d) Program policy factors. Program policy factors are those factors which, while not appropriate indicators of a proposal's individual merit (e.g. technical excellence, proposer's ability, cost, etc.), are relevant and essential to the process of choosing which of the proposals received will, taken together, best achieve the program objectives. All such factors shall be predetermined and specified in the notice so as to notify proposers that factors which are essentially beyond their control will affect the selection process. The following are examples of possible program policy factors:

(1) It is desirable, because of the nature of the energy source, the type of projects envisioned, or limitations of past efforts, to select for award or support a group of projects with a broad or specific geographic distribution;

(2) It is desirable to select for award or, support (for reasons which must be stated) projects from diverse types and sizes of proposing organizations;

(3) It is desirable to select for award or support a group of projects which represent a diversity of methods, approaches, applications, or kinds of work; and

(4) It is desirable, due to the nature of certain projects or proposing organizations, to select for award or support duplicative or complementary efforts or projects.

(e) Selection official. The selection official will be as provided in §9-3.805-50.

(f) Preliminary review.

(1) Prior to making a comprehensive evaluation of a proposal, the selection panel shall determine that it:

(i) contains sufficient technical, cost, and other required information to enable comprehensive evaluation; and

(ii) has been signed by a responsible official of the proposing organization or a person authorized to obligate such organization.

(2) If the proposal does not meet these requirements, a comprehensive evaluation shall not be made. In such case, a prompt reply shall be sent to the proposer, indicating the reason(s) for its not being selected for award or support under the PRDA.

(g) Comprehensive evaluation. The basic task in the evaluation and selection of proposals for award or support is to assess their relative merit in order to determine which of them offer the greatest likelihood for achievement of the program objectives stated in the notice, considering technical quality, ability of the proposer, estimated cost, and other relevant factors. Proposals which survive preliminary review shall be evaluated by the panel in accordance with the criteria stated in the notice. The Source Selection Official will select proposals for support or award from the findings established by the panel. In this latter process, the selection official will take into account the relevant program policy factors in order to determine the mix of proposed projects which will best further specific program goals. All findings and selections are to be documented, signed and maintained to provide an adequate record of the proceedings.

§9-4.5805 Award or support.

While only those proposals which best further the needs of the program as specified in the announcement will be considered for award or support, DOE may accept for award or support, all, none, or any number or part of the proposals submitted.

Subpart 9–4.59 Cost Participation

§9–4.5900 Scope of subpart.

(a) This subpart sets forth the DOE policy on cost participation by organizations performing research, development, and demonstration projects under DOE prime contracts. This subpart does not cover efforts and projects performed for DOE by other Federal agencies.

(b) Cost participation is a generic term denoting any situation where the Government does not fully reimburse the performer for all allowable costs necessary to accomplish the project or effort under the contract. The term encompasses cost sharing, cost matching, cost limitation (direct or indirect), participation in kind, and similar concepts.

§9–4.5901 Policy.

(a) When DOE supports performer research, development and demonstration efforts, where the principal purpose is ultimate commercialization and utilization of the technologies by the private sector, and when there are reasonable expectations that the performer will receive present or future economic benefits beyond the instant contract as a result of performance of the effort, it is DOE policy to obtain cost participation. Full funding may be provided for early phases of development programs when the technology has not been adequately evaluated or proven and when actual or potential technological problems are still great.

(b) In making the determination to obtain cost participation, and evaluating present and future economic benefits to the performer, DOE will consider the technical feasibility, projected economic viability, societal and political acceptability of commercial application, as well as possible effects of other DOE-supported projects in competing technologies.

(c) The propriety, manner, and amount of cost participation must be decided case-by-case.

(d) Cost participation is required for demonstration projects unless exempted by the Under Secretary. Demonstration projects, pursuant to this subpart, include demonstrations of technological advances and field demonstrations of new methods and procedures, and demonstrations of prototype commercial applications for the exploration, development, production, transportation, conversion, and utilization of energy resources.

§9–4.5902 Application.

(a) The DOE cost participation policy set forth in §9–4.5901 applies to all prime contracts to the extent stated therein.

(b) Cost participation is not contemplated in contracts for the operation of Government-owned or leased, contractor-operated facilities or continuing cost-reimbursement type contracts for mission-oriented, large-scale research programs performed, using equipment or facilities which are either partially or wholly Government-owned.

(c) Potential benefits to the performer are less likely where basic research is involved and cost participation, if any, is expected to be less than in circumstances where a product is being developed. As projects or proposed efforts reach stages approaching commercial viability, cost participation should be based on the overall project risk.

(d) Except for demonstration projects, the requirement for a cost participation contract in accordance with §9-4.5901 may be waived by the cognizant Program Assistant Secretary where it is determined that payment of the full allowable cost of the contractual effort is in the best interests of the Government.

(e) The performer's cost participation may be provided by other companies or associations with which it has contractual arrangements to perform the project. The fact that a project is jointly funded, e.g., where DOE and an industry association fund a third party performer, does not preclude cost participation by the performer.

§9-4.5903 Amount of cost participation.

(a) Cost participation may be in various forms or combinations, which may include but is not limited to cash outlays, real property, or interest therein needed for the project, personal property or services, cost matching, foregone fee, or other in-kind participation. Cost participation may include the value of contributions of other non-Federal sources, provided the contributions were not previously obtained free of charge from Federal sources. The value of any noncash contribution shall be established by DOE after consultation with the performer. Cost participation may be accomplished by a contribution to either direct or indirect costs provided such costs are otherwise allowable in accordance with the cost principles of the contract. Allowable costs which are absorbed by the performer as its share of cost participation may not be charged directly or indirectly to the Federal Government under other contracts, agreements, or grants.

(b) Organizations should contribute a reasonable amount of the total project cost covered under the contract. The ratio of cost participation should correlate to the apparent advantages available to performers and the proximity of implementing commercialization. In setting the levels of cost participation by the performer, the Contracting Officer, in consultation with the program office, should consider such factors as:

(1) The availability of the technology to the performer's competitors;

(2) The risks involved in achieving commercial success;

(3) The length of time before the project is likely to be commercially successful;

(4) Improvements in the performer's future commercial competitive position;

(5) Disposition of property at project's end;

(6) Whether the potential benefits will be lessened if the performer lacks production or other capabilities with which to capitalize the results of the project. However, if the results of the project are transferable to commercial organizations with production capabilities, and the performing organization would obtain patent or other property rights which could be sold or licensed, this should be considered; and

(7) Whether the performing organization lacks adequate non-Federal sources of funds from which to make cost participation.

(c) The manner of cost participation and how it is to be accomplished shall be set forth in the contract.

(d) The handling of any return from sale of products from the project shall be set forth in the contract.

(e) The solicitation document shall state whether any cost participation is required and may set forth a target level of cost participation. Though technical considerations are normally most important, the degree of cost participation will be considered when cost to the Government is to be a major factor in a selection decision.

(f) Unsolicited proposals will be considered on a case-by-case basis by the program office, in consultation with Procurement, as to the appropriateness of cost participation. If cost participation is considered to be appropriate, guidance for determining an appropriate level may be included in the procurement authorization package, but it should be recognized that the extent and type of cost participation is subject to negotiation.

(g) The extent to which a performing organization contributes to the cost of a project will be taken into consideration in the allocation of patent rights under DOE's waiver policy. (See §9-9.109-6 for patent waiver policies.)

(h) Fee or profit will not be paid the performer under a cost participation contract. Foregone fee or profit will be considered in establishing the degree of cost participation.

(i) Where cost participation is appropriate, fee or profit will not be paid to any member of the proposing team having a substantial and direct interest in the project. Competitive subcontracts placed with the prior written consent of the Contracting Officer and subcontracts for routine supplies and services are not covered by the prohibition.

§9-4.5904 Disposition of property and equipment furnished or acquired.

Disposition instructions for any property and equipment furnished or acquired using Federal funds during performance shall be set forth in the contract.

§9-4.5905 Records.

Recipients of contracts which provide for cost participation shall be required to maintain records adequate to reflect the nature and extent of their cost contribution as well as those costs charged to DOE. Such records shall be subject to audit by DOE.

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§ 9-4.5906 Payments under contracts with third party cost contributions.

Arrangements between DOE and non-Government organizations for jointly sharing the cost of projects performed by third party contractors shall provide that each party to the cost sharing agreement shall pay its share of program costs directly to the performing contractor. Any alternative arrangement must be approved in advance by the Controller or designee.

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PART 9-5 SPECIAL AND DIRECTED SOURCES OF SUPPLY

§9-5.000 Scope of part.

(a) This part implements and supplements FPR Part 1-5, Special and Directed Sources of Supply.

(b) Provisions that pertain to procurement by operating and other on-site contracts are in Subpart 9-50.5.

Subpart 9-5.3 Excess Personal Property

§9-5.300 Policy.

Policy pertaining to the use of excess personal property is contained in FPR 1-5.302 and 1-5.303.

Subpart 9-5.9 Use of GSA Supply Sources by Contractors Performing Cost-Reimbursement Type Contracts

§9-5.900 Scope of subpart.

This subpart prescribes policies and procedures to be followed by DOE offices regarding the use of GSA supply sources by cost-reimbursement type contractors. For easier designation, these will be referred to as cost-type contractors in this part.

§9-5.901 Policy.

It is DOE policy that cost-type contractors should meet their requirements from GSA sources of supply if these sources are made available to them, and if it is economically advantageous or otherwise in the best interest of the Government.

§9-5.902 Authorization to contractors.

(a) Heads of Procuring Activities may authorize cost-type contractors and subcontractors, where all higher-tier contracts and subcontracts are cost-type, to use General Services Administration (GSA) supply sources (i.e., items available through Federal Supply Schedule contracts and other GSA contracts and from GSA stores stock) in accordance with the requirements and procedures in FPR Subpart 1-5.9 and DOE PMR 109-26. This authority may be redelegated to the level of Contracting Officer.

(b) Direct procurement by DOE, rather than by a cost-type contractor, shall be required where deemed necessary by the Heads of Procuring Activities in order to carry out special requirements of appropriation acts or other applicable laws relating to particular items.

(c) Contracting Officers, when reviewing the procurement systems and methods of those cost-type contractors that have been authorized to use GSA sources of supply, shall assure that provision is made for documenting the justification of procurements from commercial sources of items available from GSA sources of supply.

(d) The Senior Procurement Official, Headquarters, shall be informed of instances in which GSA sources of supply are not used because of the quality of the items available from GSA or when a Federal Supply Schedule contractor refuses to honor an order.

Subpart 9-5.10 Use of Excess Materials from GSA Inventories

§9-5.1001 Use of excess materials from General Services Administration inventories.

(a) It is the policy of DOE to comply with the provisions of the Federal Property Management Regulations Part 101-14, National Stockpile, as supplemented from time to time by FPMR Bulletins.

(b) Section 3.0 of the Defense Mobilization Order 8600.1B, dated April 11, 1973, provides that "Under such policies and procedures as the Administrator of General Services may prescribe, Government agencies which directly or indirectly use strategic and critical materials shall fulfill their requirements through the use of materials in Government inventories that are excess to the needs thereof."

(c) DOE offices shall fulfill their requirements for strategic and critical materials through use of the excess strategic and critical materials in the GSA inventories.

(d) General Services Administration (ANSD), Washington, D.C., 20405, should be contacted directly for any detailed information concerning specifications, prices, and methods of placing the order.

Subpart 9-5.51 Use of Government Sources of Supply

§9-5.5100 Scope of subpart.

This subpart sets forth procedures to be followed in making purchases from Government sources.

§9-5.5101 Policy.

It is DOE policy to use Government sources of supply to the fullest extent practicable.

§9-5.5102 Use of GSA supply sources for DOE direct procurements.

Items listed in Federal Supply Schedules and in Federal Supply Service stores' catalogs shall be procured in accordance with FPMR 101-26 and DOE-PMR 109-26.

§9-5.5103 Use of Government sources of supply other than GSA.

(a) Heads of Procuring Activities may authorize cost-type contractors to acquire materials and services directly from such Government sources of supply in accordance with the requirements of this subsection or the consent of the agencies involved.

(b) Direct procurement by DOE, rather than by a cost-type contractor, shall be required where deemed necessary by the Head of the Procuring Activity in order to carry out special requirements of appropriation acts or other applicable laws relating to particular items.

§9-5.5104 Exclusive use on Government work.

Materials, supplies, and equipment procured from Government sources of supply under the procedures described herein must be used exclusively in connection with Government work, except as otherwise authorized by Heads of Procuring Activities.

§9-5.5105 Department of Defense.

§9-5.5105-1 Source.

Many supply facilities and contracts of the Department of Defense are made available to DOE and its cost-type contractors. Procuring activities will be notified by the Senior Procurement Official, Headquarters, when such contracts and facilities are made available. Inquiries in connection with these sources may be directed to the Senior Procurement Official, Headquarters. Requisitions or purchase orders shall be submitted directly to these sources, unless otherwise specified.

§9-5.5105-2 Requisitions.

Contractors' requisitions submitted to Defense supply centers should include the following statement on the requisition:"The consignee of the supplies and materials requisitioned herein is acting in behalf of and as agent for the Department of Energy with respect to the expenditure of Government funds." Orders submitted directly to DOE contractors shall be accompanied by an authorization substantially similar to that in FPR 1-5.903-2.

§9-5.5106 Procurement under the Economy Act from or through another Federal agency.

§9-5.5106-1 Scope of section.

This section deals with orders for supplies or services placed with another Government department or agency pursuant to the authority of the Economy Act of June 30, 1932, as amended (31 U.S.C. 686), except that it does not apply to any procurement covered by the other sections or subparts of DOE-PR 9-5 or 9-50.5. Such work or services will be performed by other government agencies unless it can be shown that it can be performed more conveniently or more cheaply by private industry, in which case it would be performed by competitive solicitation.

§9-5.5106-2 Authorization and policy relating to placing and filling orders.

(a) It is the policy of DOE not to place Government agencies in direct competition with commercial sources. Accordingly, prior to soliciting bids or proposals from commercial sources, it shall be decided whether to obtain supplies or services from Government agencies. Invitations for bids and requests for proposals shall not be sent to Government agencies. Current market prices, recent procurement prices, or prices obtained by informational bids as provided in FPR 1-1.314 may be used to ascertain whether procurement can be effected more cheaply from commercial sources.

(b) Each procuring activity, when it is in the interest of the Government to do so, may place delivery orders with any other Government department or agency for supplies or services that any such requisitioned department or agency may be in a position and willing to furnish or perform.

§9-5.5106-3 Form of interagency agreement.

Interagency agreements may take any form which will adequately reflect the interests of the parties. The following provisions provide guidelines for the preparation of such agreements.

(a) The parties to the interagency agreement.

(b) Contract number, and modification number, if any.

(c) Scope of work.

NOTE: This may be identified by reference to the specific proposal.

(d) Period of interagency agreement and/or duration of the work.

(e) Cost estimate of the project and the amount of funds to be provided by the DOE including (1) the total estimated cost of the work for the period of time specified in the agreement; (2) the capital equipment, if any, approved for acquisition under the agreement; and (3) limitations, if any, on the reimbursement of costs by DOE which are not set forth in the agreement. If DOE participates with another agency or agencies in sponsoring a work project, the amount of the contribution to be made by each agency and the basis for distributing the costs incurred shall be specified.

(f) Method of financing to be used.

(g) Standard clauses, as appropriate.

§9-5.5106-4 Methods of financing employed by DOE.

(a) Reimbursement basis. DOE requires, except as specified in paragraphs (b) and (c) of this section, that work to be done by other agencies shall be financed by reimbursement on the basis of current billings for progress payments. This approach avoids much of the accounting and reporting work required when other methods of financing are used.

(b) Consolidated working fund advance. A consolidated working fund advance shall be used to finance construction projects or the acquisition of goods or services to be furnished by the servicing agency within the same fiscal year in which the advance is made, only after a determination has been made in accordance with paragraph (a) of this section that the reimbursement basis is not to be used.

(c) Appropriation transfer. An appropriation transfer shall be used to finance larger construction projects or the acquisition of significant goods or services to be furnished by the servicing agency where the work will extend beyond the fiscal year in which the transfer is made, only after a determination has been made in accordance with paragraph (a) of this section that the reimbursement basis is not to be used.

§9-5.5106-5 Cost-reimbursement standards.

Costs actually incurred which are necessary or incident to the performance of the work are to be considered allowable for cost-reimbursement purposes. Such costs include direct and, where applicable, a properly allocable portion of indirect costs, as follows:

(a) Direct costs are the costs that can be directly identified with and charged to the work under the agreement. Examples of such costs are salaries and wages, technical services, materials, travel and transportation, communications, and any facilities and equipment expressly approved for purchase under the interagency agreement.

(b) Indirect costs shall be limited to the properly allocable portion of costs that cannot be charged directly to the work but that can be shown as mutually benefiting the work covered by the interagency agreement as well as other work of the servicing agency. Justification for any such charges shall be required, and the basis of allocation must be reasonable. Where agreements are entered into under authority of Section 601 of the Economy Act of 1932, the servicing agency's charge for any indirect costs may include appropriately allocable charges for "general administration" or "central agency overhead", as provided in Comptroller General Decision, 56 Comp. Gen. 275 (1977) as modified by 57 Comp. Gen. 674 (1978). However, general administrative or central agency overhead is chargeable only to the extent specified in the interagency agreement.

Subpart 9-5.52 Procurement of Special Items

§9-5.5200 Scope of subpart.

This subpart sets forth requirements and procedures for the acquisition of special items by DOE and cost-type contractors to the extent indicated herein.

§9-5.5201 Motor vehicles.

§9-5.5201-1 Scope of section.

This section covers the acquisition of motor vehicles including new, used, forfeited, and abandoned vehicles for use by either DOE or cost-type contractors.

§9-5.5201-2 Consolidated purchase of new vehicles by General Services Administration.

(a) Vehicles for use by DOE or DOE cost-type contractors. New vehicles for use by DOE and DOE cost-type contractors shall be procured in accordance with FPMR 101-25.113, 101-25.304, 101-26.501, and 101-38.13, DOE-PMR 109-25.304, 109-38.13, and 109-38.51.

(b) Submission of purchase orders. Except as determined necessary for internal accounting needs or purchasing records, purchase orders should be placed using the GSA "Motor Vehicle Requisition Form" (GSA 1781) for vehicles covered by Federal Standards Nos. 122, 292 or 307. DOE Form 103 or contractor's purchase order forms should be used for vehicles not covered by these standards. Requisitions for sedans, station wagons, and certain light trucks, as specified by GSA, should contain a certification that the acquisition is in conformance with P.L. 94-163 and Executive Order 12003 and its subsequent implementations.

(c) Schedule of dates for submission of orders. The schedule of dates for submission of orders is in FPMR 101-26.501-4. Heads of Procuring Activities shall consolidate and submit their requirements for passenger automobiles early in the fiscal and automotive year. Requisitions for sedans, station wagons and certain types of light trucks shall be submitted through Headquarters as outlined in §9-5.5201-6. Requisitions for all other types of vehicles may be submitted directly to GSA.

(d) Replacement of used vehicles. Heads of Procuring Activities may arrange to sell, as exchange sales, used motor vehicles being replaced and to apply the proceeds on the purchase of similar new vehicles. However, in the event personnel are not available to make such sales, or it is in the best interest of a particular office, GSA may be requested to sell the used vehicles. See FPMR 101-38.9, and DOE-PMR 109-38.9.

§9-5.5201-3 Direct purchase.

Vehicles may be procured by DOE activities directly rather than through GSA when a waiver has been granted by GSA. A copy of the activity's request to GSA for waiver shall be forwarded to the Chief, Property and Equipment Management Branch, Procurement and Contracts Management Directorate, Headquarters, for information. In those cases involving general purpose vehicles where the GSA refuses to grant a waiver and where it is believed that procurement through GSA would adversely affect or otherwise impair the program, authority for direct procurement shall be obtained from the above-mentioned Headquarters official, prior to procurement. In the procurement of special purpose trucks for use by DOE contractors, the Head of Procuring Activity may authorize direct purchases. The purchase price shall not exceed any statutory limitation in effect at the time the procurement is made. (See DOE-PMR 109-38.51.)

§9-5.5201-4 Used vehicles.

Normally DOE does not purchase or authorize cost-type contractors to purchase used vehicles. However, Heads of Procuring Activities may authorize the purchase of used vehicles where justified by special circumstances, e.g., when new vehicles are in short supply or the vehicles are to be used for experimental or test purposes or the vehicles are acquired from exchange sale. (The statutory passenger vehicle allocation requirements for DOE shall apply to any purchase of used vehicles except in the case of those to be used exclusively for experimental or test purposes.)

§9-5.5201-5 Forfeited or abandoned vehicles.

Vehicles which have been abandoned to, or seized by and forfeited to, the Government are available for transfer to Federal agencies by the Federal Supply Service, GSA, in accordance with the provisions of the Act of August 27, 1935 (40 U.S.C. sections 304f-304m). Whenever forfeited or abandoned vehicles are available for transfer to DOE, the Utilization and Disposal Service, Personal Property Division, Region 3, GSA, Washington, DC 20407, will notify the Senior Procurement Official, Headquarters, of such availability and allow DOE approximately 3 days to determine whether the vehicles can be utilized. Within that time, the Chief, Property and Equipment Management Branch, Headquarters, will make the necessary arrangements with GSA for the release of any required vehicles. (See FPMR 101-43.4.)

§9-5.5201-6 Acquisition of fuel-efficient vehicles.

All sedans and station wagons and certain types of light trucks, as specified by the GSA, that are acquired by purchase or lease (for 60 continuous days or more) for official use by DOE or DOE cost-type contractors, are subject to the requirements of the Energy Policy and Conservation Act of 1975 (EPCA), P.L. 94-163 and of Executive Order 12003 and subsequent implementing regulations. Accordingly, the Director of Administration and Heads of Procuring Activities will submit annually to the Chief, Property and Equipment Management Branch, Procurement and Contracts Management Directorate, HQ, for approval, a forecast of plans for the acquisition, purchase, or lease of such vehicles during the fiscal year. Such forecast shall be submitted so as to arrive at Headquarters on or before October 15 of each year. Additionally, the original and 2 copies of requisitions (GSA1781) for the procurement of, and proposals/requests to commercially lease, such vehicles shall also be forwarded to the Chief, Property Management Branch, HQ, for review and certification/approval prior to submission to GSA or execution of lease agreements. All such documentation will be reviewed by this official and a determination made as to conformance with applicable annual forecasts and pertinent public laws and their implementations. (See DOE-PMR 109-38.13.)

Sedans, station wagons and light trucks requisitioned according to an approved plan, but not contracted for by the GSA until the subsequent fiscal year, will be included in the acquisition plan for the higher miles-per-gallon criteria of the year in which the GSA signs the purchase contract along with the new vehicles planned for acquisition that year. Leased vehicles will meet the miles-per-gallon criteria of, and be incorporated in, the approved plan of the fiscal year in which leases are initiated, reviewed, extended or increased in scope. Vehicle leases will specify the vehicle model type to be provided.

§9-5.5202 Typewriters.

§9-5.5202-1 Scope of section.

This section covers the purchase, for use by either DOE or cost-type contractors, of (a) typewriters, whether to fill initial requirements or for replacement purposes, and (b) typewriter repair and reconditioning services.

§9-5.5202-2 Definition.

"Typewriters" are manually and electrically operated machines having standard or special keyboards, designed to produce printed characters by impression of type upon paper through the medium of an inked ribbon. The term includes the varityper, hektowriter, proportional spacer, flexowriter, justowriter, and portable typewriting machines but does not include bookkeeping, billing, or teletypewriting machines.

§9-5.5202-3 Replacement standards.

Typewriters shall be purchased for replacement purposes in accordance with FPMR 101-25.403 and DOE-PMR 109-25.403.

§9-5.5202-4 Procedures and requirements for purchase, rental, repair, and maintenance.

Purchase orders for typewriters, whether for replacement or otherwise, and for rental, repair, or maintenance shall be prepared and transmitted to the approprite Federal Supply Schedule contractor. DOE Contracting Officers shall use Form DOE-103 for such purpose. When cost-type contractors are authorized to make purchases under Federal Supply Schedules, Heads of Procuring Activities may authorize them to use their own purchase order forms properly identified according to FPR subpart 1-5.9.

§9-5.5202-5 Justifications.

(a) The justification which is required for DOE direct procurements of typewriters made at price other than the lowest delivered price available is set forth in FPMR 101-26.408-3.

(b) Electric typewriters. Electric typewriters for use by DOE and its cost-type contractors may be purchased only when the DOE standards are met.

(c) Regulations. The procurement of typewriters that will be used for printing shall comply with the approval requirements of the Joint Committee on Printing.

§9-5.5203 Printing equipment and services.

§9-5.5203-1 Regulations.

The Joint Committee on Printing, Congress of the United States, periodically publishes "Government Printing and Binding Regulations." These regulations and DOE Order 1340, "Printing and Related Activities," govern the acquisition, use, and disposal of printing. Inclusion of printing (limited exceptions are set forth in paragraphs 35-2 through 35-4 of the Government Printing and Binding Regulations) in contracts for supplies and services is prohibited unless specifically approved by the senior official in charge of administrative services, DOE Headquarters.

§9-5.5204 Alcohol.

§9-5.5204-1 Scope of section.

This section covers (a) Bureau of Alcohol, Tobacco and Firearms, Treasury Department, alcohol regulations applicable to DOE, (b) delegations of authority to submit applications to purchase tax-free alcohol or specially denatured alcohol, and (c) purchases of alcohol by DOE or cost-type contractors. To the fullest extent practicable, alcohol for use by DOE or its cost-type contractors shall be procured on a tax-free basis.

§9-5.5204-2 Regulations.

Bureau of Alcohol, Tobacco and Firearms regulations relating to the procurement and use of alcohol free of tax, by Government agencies, are set forth in 26 CFR 213.141-213.146. Copies of excerpts from these regulations may be secured from the Bureau of Alcohol, Tobacco and

Firearms, Washington, DC 20226. These regulations shall be followed in the procurement of alcohol.

§9-5.5204-3 Application forms and permits.

ATF Form 1486, "Specially Denatured Spirits for Use of United States," and ATF Form 1444, "Tax Free Spirits for Use of United States," shall be used for procurements of specially denatured alcohol and ethyl alcohol, respectively. Part I of each form is the application for permission to procure and Part II is the permit. If procurement from more than one warehouse is desirable, separate applications must be made for withdrawals from each warehouse. When permits are no longer required, they should be forwarded to the Bureau of Alcohol, Tobacco and Firearms for cancellation. Alcohol procured by use of the ATF forms referred to in this subsection shall be used exclusively on DOE work.

§9-5.5204-4 Authority to sign applications.

Specific DOE personnel have been authorized to execute Part I of Forms 1444 and 1486 by letters to the Director, Bureau of Alcohol, Tobacco and Firearms without power of redelegation. Copies of such letters have been furnished to field offices. In addition, the Senior Procurement Official, Headquarters, has been authorized to sign and delegate to others, authority to sign applications under Bureau of Alcohol, Tobacco and Firearms regulations relating to the procurement and use of alcohol free of tax. Only the individuals so authorized shall execute Part I of these forms. Requests by field offices for new authorizations or discontinuance of existing authorizations shall be submitted by letter to the Senior Procurement Official, Headquarters. Requests for new authorizations shall be accompanied in each case by a 3X5 card with the following information typed thereon:

______________________________, whose signature appears below, is authorized to sign application Forms 1444 and 1486, on behalf of DOE.

____
(Signature)

____
(Title)

§9-5.5204-5 Filing applications.

Applications shall be executed in duplicate by the authorized DOE official and mailed directly to the Director, Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226. No transmittal letter is required. Where alcohol or specifically denatured alcohol is for use directly by DOE, the form shall indicate that shipment shall be made to the DOE in care of the cost-type contractor.

§9-5.5204-6 Forms and authorized plants.

Annually, the Bureau of Alcohol, Tobacco and Firearms publishes printed lists of Distilled Spirits Plants, Bonded Warehouses and Denaturing Plants Authorized to Operate. Copies of these lists and supplies of Forms 1444 and 1486 may be secured by written request to the Director, Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226.

§9-5.5204-7 Placing the order.

A signed copy of the permit shall accompany the original purchase order issued to the plant or warehouse, where it will be retained. Subsequent orders shall refer to the permit on file in the plant or warehouse. Order Form DOE-103 shall be issued by DOE for cost-type contractors' requirements, except as provided in §9-5.5204-9.

§9-5.5204-8 Notice of shipment.

When alcohol is shipped, the shipper prepares the required forms as specified by Bureau of Alcohol, Tobacco and Firearms regulations and forwards them to the consignee. Upon receipt of the receiving report covering the shipment, the officer who signed the purchase order shall execute the certificate of receipt and forward it to the appropriate Regional Director, Bureau of Alcohol, Tobacco and Firearms. The carrier transporting the alcohol shall also be given a receipt as specified by Bureau of Alcohol, Tobacco and Firearms regulations.

§9-5.5204-9 Orders placed by cost-type contractors.

(a) Specially denatured alcohol. Heads of Procuring Activities may authorize cost-type contractors to apply for permits to purchase specially denatured alcohol, subject to restrictions of the Bureau of Alcohol, Tobacco and Firearms as to end use. In order to qualify, cost-type contractors must be bonded, must submit reports, and are subject to inspection by the Bureau of Alcohol, Tobacco and Firearms.

(b) Tax-free alcohol. Under Bureau of Alcohol, Tobacco and Firearms regulations, cost-type contractors performing scientific or research work or operating hospitals are permitted to procure alcohol tax-free. These regulations require bonding under certain circumstances, submission of reports, and inspection by the Bureau of Alcohol, Tobacco and Firearms.

(c) DOE versus cost-type contractor alcohol procurement. Purchase may be made by either DOE or cost-type contractor, whichever is in the best interest of the Government, taking into consideration administrative costs and any other pertinent factors that may be applicable to individual situations. On purchases for recurring requirements, one of the factors to consider is that for purchases by DOE, the bonding, reporting, and inspection requirements do not apply.

§9-5.5204-10 Abandoned and forfeited alcohol.

Abandoned and forfeited alcohol which has come into the custody or control of any Federal agency may be obtained by following the procedure set forth in FPMR 101-43.4.

§9-5.5205 Helium.

§9-5.5205-1 Scope of section.

This section covers acquisition of helium for use by either DOE or cost-type contractors.

§9-5.5205-2 Basic source of supply.

The Helium Act (Public Law 86-777, as amended (50 U.S.C. 167(d)) provides that, to the extent that supplies are readily available, whether in gaseous or liquid form, the DOE shall purchase all major requirements of helium from the Secretary of the Interior either directly or from suppliers who have purchased or will purchase an equivalent amount of Bureau of Mines helium in accordance with 30 CFR, Part 2.

§9-5.5205-3 Methods of purchase.

(a) Purchases may be made from the Secretary of the Interior for either DOE or cost-type contractors' requirements for helium by forwarding a purchase order in duplicate (Form DOE-103 or the cost-type contractor's purchase order properly identified in accordance with the Use of Government Sources of Supply) to: Bureau of Mines, Helium Operations, Box H 4372, Herring Plaza, Amarillo, Texas 79101.

(b) Purchases may be made from commercial firms as indicated in subparagraphs (1) and (2) of this paragraph, provided that the vendor is required to furnish Bureau of Mines helium or buy the equivalent from the Bureau of Mines.

(1) Commercial firms under GSA Schedule contracts.

(2) Commercial firms, including private distributors listed by the Bureau of Mines as eligible to sell helium to Federal agencies (30 CFR, Part 2), pursuant to usual procurement and contracting procedures.

(c) In all cases, except where purchase is made from the Bureau of Mines directly, the purchase orders shall contain the following statement:

> Helium furnished under this contract shall be Bureau of Mines helium as defined by Parts 601 and 602, Subchapter A, Chapter VI, Title 30, Code of Federal Regulations.

(d) One (1) copy of each procurement document issued pursuant to paragraph (b)(2) of this section shall be furnished to the address in paragraph (a) of this section.

§9-5.5206 Miscellaneous items.

§9-5.5206-1 Scope of section.

This section sets forth the procedures and requirements for the purchase of various miscellaneous items. These procedures and requirements shall be applied to cost-type contractors to the extent indicated in each subsection of this section.

§9-5.5206-2 Aircraft.

All acquisitions of aircraft by either DOE or cost-type contractors (except for temporary (30 days or less) rentals or loans) shall be approved in advance by the Senior Procurement Official, Headquarters.

§9-5.5206-3 DOE forms.

DOE forms are those approved by the Office of the Controller, Headquarters, for use throughout DOE. Cost-type contractors shall obtain their requirements for DOE forms through DOE.

§9-5.5206-4 Standard, optional and other agency forms.

(a) Source of supply. The General Services Administration stocks for issue to agencies standard forms approved by the Bureau of the Budget or the General Accounting Office and other common-use forms, such as Treasury forms, Civil Service forms, and optional forms. The Federal Supply Stores Catalog lists forms carried in stock.

(b) Ordering forms from Federal Supply Service. DOE offices shall submit purchase orders for standard forms, except as specified in paragraph (c) of this section, directly to the appropriate Federal Supply Stores Depot. Orders for forms may include requests for other items normally carried in stock. Orders for quantities of forms in excess of quantities normally furnished from stock will be extracted by the store's depot and sent to GSA Region 3, Washington, D.C. 20407, to be filled either by GSA Region 3 or by the Government Printing Office. Cost-type contractors shall obtain their requirements for standard, optional, and other agency forms through the DOE.

(c) Overprinted or altered forms. Forms that require overprinting, serial numbering, or different grade, weight, or color of paper, or a major alteration in construction shall be requisitioned from the Director of Administration or designee.

§9-5.5206-5 Steel filing cabinets.

(a) Procurement of steel filing cabinets, by either DOE or cost-type contractors, is subject to DOE utilization requirements.

(b) Direct DOE procurements of steel filing cabinets are subject to the requirements of FPMR 101-26.308. These requirements do not apply to contractors authorized to use GSA supply sources. However, such filing cabinets shall not be procured by DOE cost-type contractors unless approved by the Head of the Procuring Activity on the basis that DOE utilization requirements have been met and the actions prescribed by FPMR 101-25.302-2 and DOE-PMR 109-25.302.2 have been taken. A copy of the HPA approval shall be retained in the appropriate purchasing office files.

§9-5.5206-5a Security cabinets.

Such cabinets shall not be procured by DOE or cost-type contractors unless approved by the Head of the Procuring Activity on the basis that DOE utilization requirements and the "prerequisites to ordering" criteria outlined in FPMR 101-25.302-2 and DOE-PMR 109-25.202-2 have been met (GSA approval not required). In the event any security cabinets are approved for purchase, the procedures established in FPMR 101-26.507 for consolidated procurement of security cabinets shall be followed.

§9-5.5206-6 New electric water coolers.

DOE offices shall procure new electric water coolers in accordance with FPMR 101-26.502. When cost-type contractors, consistent with the policy set forth in §9-5.901, procure new electric water coolers from GSA supply sources, they shall procure in accordance with FPMR 101-26.502.

§9-5.5206-7 Appliances.

DOE activities shall procure new refrigerators, freezers, ranges, washers, dryers, water heaters, and garbage disposals in accordance with FPMR 101-26.503. When cost-type contractors, consistent with the policy set forth in §9-5.901, procure these items from GSA supply sources, they shall be procured in accordance with FPMR 101-26.503.

§9-5.5206-8 Rental of post office boxes.

DOE offices and cost-type contractors may rent post office boxes on an annual basis, or for shorter periods by quarters, where necessary. Payments for annual rentals are to be made in advance at the beginning of the fiscal year, and for periods of less than a year, either in advance for the whole period or at the beginning of each quarter in which the box is to be used.

§9-5.5206-9 Government license tags.

(a) In the District of Columbia. Official Government tags shall be procured (without charge) by the Senior Procurement Official, Headquarters, from the Department of Vehicles and Traffic, District of Columbia, for all motor vehicles (except vehicles exempt for security purposes) operated principally in the Metropolitan Area of Washington, D.C.

(b) Outside the District of Columbia. DOE offices operating Government-owned motor vehicles for official purposes (including Government vehicles operated by cost-type contractors), principally outside the Metropolitan Area of Washington, D.C., shall (except for vehicles exempt for security purposes) procure official U.S. Government tags from the Superintendent of Industries, District of Columbia, Department of Correction, Lorton, Va., in accordance with the following instructions:

(1) Orders (Form DOE-103) shall include code letter "E" and tag numbers, delivery dates, consignment and shipping instructions, symbol of the appropriation to be charged, amount of obligation which has been established on the books of the DOE field office, and

the signature of an officer authorized to obligate the appropriation to be charged.

(2) See FPMR 101-38.3 concerning prices to be used for obligation purposes when ordering tags.

(3) Where the size of the shipment requires use of a Government bill of lading, that document shall accompany the purchase order. Where quantities are mailable, the District of Columbia, Department of Correction, will supply the necessary postage and add the cost to the invoice. (A pair of tags weighs approximately 1 pound, 1 ounce.)

(4) The letter "E" is the prefix symbol for DOE official license tags. Block numbers have been assigned to field offices. Additional numbers will be assigned by the office of the Senior Procurement Official, Headquarters, when requested.

(c) Special plates. Special plates for security purposes shall be purchased by DOE offices for DOE and cost-type contractors in accordance with local laws, regulations and instructions.

(d) See DOE-PMR 109-38.3 and 109-38.6 for additional guidance.

§9-5.5206-10 Fuels and packaged petroleum products.

DOE offices shall procure fuels and packaged petroleum products (e.g., lubricating oil, gasoline, fuel oil, kerosene, and solvents) in accordance with FPMR 101-26.602. When cost-type contractors, consistent with §9-5.51, procure such products from Defense sources, they shall do so in accordance with FPMR 101-26.602.

§9-5.5206-11 Arms and ammunition.

Pursuant to 10 U.S.C. 4655, the Secretary of the Army is authorized to furnish arms, suitable accouterments for use therewith, and ammunition for the protection of public money and property.

(a) The Department of the Army has granted a general clearance for Federal agencies to procure, without further reference to or clearance from that Department, all arms and ammunition of types which are not peculiar to the military services, and which are readily procurable in the civilian market.

(b) Procurement of arms and ammunition readily procurable in the civilian market shall be made in accordance with regular procurement procedures by either DOE or cost-type contractors.

(c) Procurement of arms and ammunition for DOE or cost-type contractors which are peculiar to the military services shall be made by the DOE by submission of Order Form DOE-103 to the Commanding General, Headquarters U.S. Army Materiel Development and Readiness Command, 5001 Eisenhower Avenue, Alexandria, VA 22333.

§9-5.5206-12 Furniture.

DOE offices and cost-type contractors shall procure furniture in accordance with FPMR 101-26.505.

§9-5.5206-13 Gold.

Sales of gold shall be in accordance with FPMR 101-45.309-9.

§9-5.5206-14 Purchases of sundry items from Government Printing Office.

DOE offices shall purchase from the Government Printing Office, Washington, D.C. 20401, paper, envelopes, inks, glues, and other supplies, as listed in the current GPO Catalog and Price List for such items, except that DOE offices may purchase such items from other sources when it is more economical to do so, taking into consideration the cost of packing and transportation.

§9-5.5206-15 Materials handling equipment replacement standards.

Materials handling equipment shall be purchased for replacement purposes by DOE offices and cost-type contractors in accordance with the standards in FPMR 101-25.405 and DOE-PMR 109-25.405. Heads of Procuring Activities are authorized to replace an item earlier than the date specified in such standards under unusual circumstances. A written justification shall be placed in the purchase file.

§9-5.5206-16 Calibration services.

Orders for calibration services may be placed with the National Bureau of Standards, Washington, D.C. 20234, by either DOE procurement offices or cost-type contractors. Copies of the letters authorizing cost-type contractors to order calibration services on behalf of DOE should be sent to the Bureau of Standards, Attention: "Administrative Service Division."

§9-5.5206-17 Wiretapping and eavesdropping equipment.

All procurement by DOE offices and cost-type contractors of devices primarily designed to be used surreptitiously to overhear or record conversations is prohibited.

§9-5.5206-18 Coal.

DOE offices and cost-type contractors may participate in the Defense Fuel Supply Center coal contracting program for carload or larger lots. If participation is desired, estimates shall be submitted to DFSC in accordance with FPMR 101-26.602.

§9-5.5206-19 Procurement of gas masks and canisters.

M9 Army assault mask and M11 and M14 canisters, supplies of the M9 series protective field mask (Army assault mask) and M11 and M14 canisters are being maintained at Oak Ridge, Tenn., and Richland, Wash., for requisition by DOE offices and cost-type contractors.

(a) The masks supplied by Oak Ridge and Richland are refurbished to serviceable condition and tested for reliability before they are placed in stock. Each mask has been equipped with an M11 canister and is packaged in a transparent film bag.

(b) For requisition of masks, purchasers should state, in addition to information for shipment, the quantity of masks required in large or medium size and whether a carrier for each mask is required. Price of each mask, with or without carrier, is $13.50, f.o.b. Oak Ridge, Tenn., or Richland, Wash.

(c) For requisition of canisters for the M9 mask, purchasers should state, in addition to information for shipment, the type and quantity required at respective unit prices, f.o.b. Oak Ridge, Tenn., or Richland, Wash.:

Canister, M11, FSN 4240-112-9365 (filter paper and Whetlerized carbon) — $2.25
Canister, M14, FSN 4240-203-3733 (double thickness of filter paper) — $8.40

(d) DOE or cost-type contractor purchase orders for masks and canisters should be addressed to:

(1) For delivery east of the Mississippi River:
Union Carbide Corp., Nuclear Division,
Oak Ridge Gaseous Diffusion Plant,
Post Office Box P,
Oak Ridge, TN 37830.

(2) For delivery west of the Mississippi River:
Rockwell International Corp.,
Post Office Box 250,
Richland, WA 99352.

§9-5.5206-20 Procurement of electronic data processing tape.

(a) All DOE direct procurement of electronic data processing tape shall be made in accordance with the provisions of FPMR 10126.508.

(b) DOE offices having requirements in excess of the maximum order limitation of the Federal Supply Schedule should contact GSA directly to make arrangements for obtaining the quantities needed, in accordance with the provisions of FPMR 101-26.508-2.

(c) DOE offices having requirements for types of electronic data processing tape other than those covered by Interim Federal Specification W-T-0051c (GSA-FSS) or current Federal Supply Schedules shall submit their requirements directly to GSA in accordance with the provisions of FPMR 101-26.508-2.

(d) Procuring activities shall require all their cost-type contractors to obtain their requirements for electronic data processing tape in accordance with the provisions of FPMR 101-26.508-1. If adequate justification exists, Heads of Procuring Activities may authorize these cost-type contractors to obtain their tape from other sources. When a manager does authorize a contractor to obtain its requirements from other sources, a copy of the authorization, together with a brief statement of the justification, should be sent to the Senior Procurement Official, Headquarters, for informational purposes.

(e) DOE offices should consolidate their requirements and the requirements of their cost-type contractors for electronic data processing tape when it appears that such action would be practical and would result in significant price advantages to the Government.

§9-5.5206-21 Procurement of masking devices.

Masking devices are assembled in the DOE plant at Paducah, KY., and may be requisitioned by DOE offices and cost-type contractors at cost from:

______________________________, Area Manager
DOE, Paducah Area Office,
Post Office Box 1213,
Paducah, KY 42001.

§9-5.5207 Special materials.

This section covers the purchase of materials peculiar to the DOE program. While purchases of these materials are unclassified, quantities, destination or use may be classified. See appropriate sections of the Classification Guide. Procuring activities shall require cost-type contractors to obtain the special materials identified in the following subsections in accordance with the procedures stated therein.

§9-5.5207-1 Heavy water.

The Senior Program Official or designee controls the procurement and production of heavy water for a given program. DOE offices and cost-type contractors shall place orders directly with the Senior Program Official or designee.

§9-5.5207-2 Platinum.

The Chicago Operations Office is responsible for maintaining the DOE platinum supply. DOE offices and cost-type contractors shall clear with the Chicago Operations Office as to the availability of platinum prior to the purchase of platinum on the open market.

§9-5.5207-3 Jewel bearings.

See FPR 1-1.319.

Subpart 9–5.54 Use of Procurement and Supply Management Support Services at the Nevada Test Site

§9–5.5400 Scope of subpart.

This subpart sets forth DOE policy for the use of the procurement and supply management support services at the Nevada Test Site. The provisions of this subpart shall be applied to cost-type contractors carrying out projects at the NTS.

§9–5.5401 Policy.

As an integral part of their responsibility for furnishing project-related materials, equipment, and technical services, the Nevada Operations Office shall, except in special cases, provide to the fullest practicable extent, the necessary procurement and supply management support services required to support the technical efforts of all organizations sponsoring experiments or participating in the scientific aspects of experiments conducted at the NTS. Furthermore, all organizations that are carrying out projects or performing work at the NTS will make the fullest practicable use of these facilities and services to prevent unnecessary duplication and to assure maximum efficiency and economy.

Subpart 9-5.55 Purchase or Lease Determinations

§9-5.5500 Scope of subpart.

(a) This subpart implements and supplements FPMR 101-25.5 which prescribes guidelines to be used in determining whether acquisition of particular types of equipment should be by purchase or lease.

§9-5.5501 Policy.

(a) The guidelines prescribed in FPMR 101-25.5 for making purchase or lease determinations shall be applied to the acquisition of all types of equipment. These guidelines shall be used in making lease-versus-purchase determinations at time of original acquisition, when lease renewals are being considered, or at other times as circumstances warrant.

(b) Contracting Officers shall assure the use of applicable lease-versus-purchase guidelines in all procurement and supply operations under their jurisdiction.

§9-5.5502 Utilization of excess equipment or interest in equipment.

Excess lists shall be consulted prior to leasing equipment in both original and renewal leasing actions. Also, leased equipment shall be offered for utilization by other DOE offices and DOE contractors prior to release whenever an accumulated credit toward purchase of the equipment will be lost.

§9-5.5503 Maintenance of records.

Records shall be maintained of all lease-purchase studies and other pertinent data used to support administrative actions taken.

§9-5.5504 Funding considerations.

Unavailability of funds is generally not adequate justification for a decision to lease when purchase is indicated by the lease-purchase study to be the more economical course of action. In such circumstances, it is essential that every effort be made to follow the purchase course of action. This is true both with respect to those studies made at the time leases are renewed or when other circumstances warrant.

§9-5.5505 Leasing of equipment.

If leasing of equipment is necessary, and a lease with purchase option is executed, the purchase option shall be exercised at the earliest possible date, provided purchase is the more economical course of action.

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PART 9-6 FOREIGN PURCHASES

Subpart 9-6.1 Buy American Act - Supply and Service Contracts

§9-6.100 Scope of subpart.

This subpart implements FPR Subpart 1-6.1.

§9-6.103 Exceptions.

§9-6.103-2 Nonavailability in the United States.

Contracting Officers may make the determination required by FPR 1-6.103-2, provided such determination is factually supported in writing.

§9-6.104 Procedures.

§9-6.104-4 Evaluation of bids and proposals.

Proposed awards shall be submitted (in triplicate) through the Senior Procurement Official, Headquarters, to the Head of the Agency for decision where:

(a) Rejection of an acceptable low foreign bid is considered necessary to protect essential national security interests such as maintenance of a mobilization base; and

(b) Rejection of any bid or proposal for other reasons of the national interest when it is considered necessary.

§9-6.105 DOE list of supplies excepted from Buy American Act (supplies to be procured for public use).

Antimony
Asbestos
Bauxite
Bismuth
Books,trade, text, technical, or scientific; newspapers, magazines, periodicals; and printed briefs and films not printed in the United States, and for which domestic editions are not available.
Cadmium
Calcium cyanamide
Castor oil
Chrome ore or chromite
Cobalt (ore and metals)
Cork
Cryolite, natural
Diamonds, industrial and abrasive
Graphite, natural
Iodine
Jute and jute burlaps
Logs, veneer, and lumber from balsa, greenheart, lignum vitae,

mahogany, and teak
Mica
Nickel
Crude petroleum, petroleum fuels, and petroleum lubricants
Platinum and related group metals
Radium salts, source and special nuclear materials
Rubber, crude and latex
Rutile
Shellac
Spare parts for equipment of foreign manufacture, and for which domestic parts are not available
Sperm oil
Tartaric acid
Tin

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PART 9-7 CONTRACT CLAUSES

§9-7.000 Scope of part.

This part implements FPR Part 1-7 which sets forth contract clauses for use in connection with the procurement of personal property and nonpersonal services (including construction), and supplements, as well as modifies, FPR Part 1-7 by prescribing certain DOE contract clauses to be used in addition to or in place of such FPR clauses.

§9-7.050 General policy.

It is DOE policy to use the prescribed FPR and DOE contract clauses wherever practicable; uniformity in the use of contract clauses tends to insure impartial treatment of all contractors, expedites negotiation and contract review, and facilitates contract administration.

§9-7.051 Deviations.

The clauses in Part 9-7 are categorized in the same manner as the clauses in FPR 1-7. There are three categories: required; when applicable; and additional. The deviation procedures which are applicable to each category are as follows:

(a) Required clauses. The required clauses in FPR 1-7, and the required DOE-PR clauses and modifications to the FPR required clauses shall be used as prescribed. Textual modification or deletion of any required clause requires approval in accordance with §9-1.009. Minor changes in wording which may become necessary in negotiations are not considered deviations, provided Counsel determines that the change is not prohibited by statute, executive order, or administrative regulation and does not alter the meaning, intent or basic principles expressed in these clauses.

(b) When applicable clauses. The clauses in this category shall be used where the circumstances for which the clauses were designed exist. Textual modifications or use of a clause covering the same subject matter which varies from a clause as set forth requires approval in accordance with §9-1.009. Minor changes in wording which may become necessary in negotiations are not considered deviations, provided, Counsel determines that the change is not prohibited by statute, executive order, or administrative regulation and does not alter the meaning, intent or basic principles expressed in these clauses.

(c) Additional clauses. The additional clauses are provided for guidance and use as decided locally. The clause text may be modified or other clauses substituted as needed without obtaining approval in accordance with §9-1.009.

Subpart 9-7.1 Fixed-Price Supply Contracts

§9-7.100 Scope of subpart.

This subpart supplements FPR 1-7.1.

§9-7.102 Required clauses.

FPR 1-7.102 sets forth required clauses. This section prescribes certain modifications to those FPR clauses and establishes additional DOE required clauses.

§9-7.102-1 Definitions.

Add the following paragraph (d) to FPR 1-7.102-1:

(d) The term DOE means the U. S. Department of Energy.

§9-7.102-19 Termination for convenience of the Government.

Modify FPR 1-8.701 paragraph (f) by deleting all after the reference "(41 CFR 1-15)" and inserting the following in lieu thereof: "as supplemented or modified by DOE-PR Part 9-15.2 (41 CFR §9-15.2) in effect on the date of the contract."

§9-7.102-20 Pricing of adjustments.

FPR 1-7.102-20 is modified by deleting all after "(41 CFR 1-15)" and inserting the following in lieu thereof: "as supplemented or modified by DOE-PR Part 9-15.2 (41 CFR §9-15.2) in effect on the date of this contract."

§9-7.102-50 Order of precedence.

> In the event of an inconsistency between provisions of this contract, the inconsistency shall be resolved by giving precedence as follows: (a) schedule; (b) statement of work; (c) the general provisions; (d) other provisions of the contract, whether incorporated by reference or otherwise; (e) contractor's technical proposal, if incorporated in the contract by reference or otherwise.

§9-7.102-51 (Reserved)

§9-7.102-52 Patent indemnity.

Insert the appropriate clause set forth in §9-9.103 under the conditions contained in §9-9.103.

§9-7.102-53 Reserved

§9-7.102-54 Reporting of royalties.

Insert the clause in §9-9.110 under the conditions set forth therein.

§9-7.102-55 Authorization and consent.

Insert the clause set forth in Section 9-9.102-1 under the conditions set forth therein.

§ 9-7.102-56 Incentive Price Revision Clause (Firm Target).

When a fixed-price incentive contract described in FPR 1-3.404-4(a)(2) is used, the following clause shall be made a part of the contract. As to each item which is subject to incentive price revision, the contract schedule shall set forth the target cost, target profit, and target price.

> **Incentive Price Revision (Firm Target)**
>
> (a) *General.* The supplies or services identified in the Schedule as items (Identify) are subject to price revision in accordance with the provisions of this clause: *Provided.* That in no event shall the total final price of such items exceed (Insert Written Amount) dollars (Insert Amount). Any supplies or services which are to be ordered separately under, or otherwise added to, this contract and which are to be subject to price revision in accordance with the provisions of this clause, shall be identified as such in a modification to this contract.
>
> (b) *Definition of Cost.* For the purpose of this clause, "cost" or "costs" means allowable costs in accordance with Part 1-15.2 (41 CFR 1-15.2) of the Federal Procurement Regulations, as supplemented or modified by DOE-PR 9-15.2 (41 CFR 15.2), in effect on the date of this contract.

(c) *Submission of Data.* Within (Insert written number of days) (Insert number of days) days after the end of the month in which the Contractor has delivered the last unit of supplies and completed the services called for by those items referred to in paragraph (a) of this section, the Contractor shall submit, on Optional Form 60 or such other form as the Contracting Officer may require, (i) a detailed statement of all actual costs incurred up to the end of that month in performing all work under such items, (ii) an estimate of costs of such further performance, if any, as may be necessary to complete performance of all work with respect to such items, and (iii) a list of all residual inventory and an estimate of the value thereof (the Contracting Officer will determine whether to reduce the final negotiated cost by the value of the residual inventory or whether the Government will take title to the residual inventory with no reduction to the final negotiated cost for the value of the residual inventory).

(d) *Price Revision.* Upon submission of the data required by paragraph (c) of this section, the Contractor and Contracting Officer shall promptly establish the total final price in accordance with the following:

(1) On the basis of the information required by paragraph (c) of this section, together with any other pertinent information, there shall be established by negotiation the total final cost incurred or to be incurred for the supplies delivered (or services performed) and accepted by the Government, which are subject to price revision under this clause.

(2) The total final price shall be established by adjusting the total final negotiated cost by an amount for profit or loss determined as follows:

When the total final negotiated cost is	The adjustment for profit or loss is
Equal to the total target cost	Total target profit.
Greater than the total target cost	Total target profit less ——— percent (——— %) of the amount by which the total final negotiated cost exceeds the total target cost.
Less than the total target cost	Total target profit plus ——— percent (———%) of the amount by which the total final negotiated cost is less than the total target cost.

(3) The total final price of the item(s) referred to in paragraph (a) of this section shall be evidenced by a modification to this contract signed by the Contractor and the Contracting Officer. Such price shall not be subject to revision notwithstanding any changes in the cost of performing the contract, with the following exceptions:

(i) insofar as the parties may agree in writing, prior to the determination of the total final price, (A) to exclude any specific elements of cost from the total final price and (B) to adopt a procedure covering subsequent disposition of such elements; and

(ii) to the extent any adjustment or credit is expressly permitted or required by this or any other clause of this contract.

(e) *Subcontracts.* No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis.

(f) *Adjustment of Payments.* Pending execution of the contract modificaton referred to in subparagraph (d)(3) of this section, the Contractor shall submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices shall be the target prices set forth in this contract; *Provided,* That if at any time it appears that the then current billing prices will be substantially greater than the estimated final price in light of information provided by the Contractor in accordance with provisions of paragraph (g)(2) of this section, a reduction in the billing prices shall be negotiated. Similarly, the parties may negotiate an increase in billing prices by any or all of the difference between the target price and the ceiling price upon submission of factual data from the Contractor showing that final cost under this contract will be substantially greater than target cost. Any adjustment of billing prices shall be reflected in a modification to this contract, and shall not affect the determination of the total final price under paragraph (d) of this section. After execution of the contract modification referred to in paragraph (d)(3) of this section, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the total final price and any additional payments, refunds, or credits, resulting therefrom shall be promptly made.

(g) *Limitation on payments.* (1) This paragraph (g) shall not apply after final price revision.

(2) Within forty-five (45) days after the end of each quarter of the Contractor's fiscal year, beginning with the quarter in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and as of the end of each subsequent quarter the Contractor shall submit to the Contracting Officer a cumulative statement setting forth:

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government for which final prices have been established;

(ii) The total cost (estimated to the extent necessary) reasonably incurred for and properly allocable solely to the supplies delivered (or services performed) and accepted by the Government for which final prices have not been established;

(iii) That portion of the total target profit which is in direct proportion to the supplies delivered (or services performed) and accepted by the Government for which prices have not been established, increased or decreased in accordance with incentive profit formula set forth in paragraph (d)(2) of this section when the amount of cost stated under paragraph (g)(2)(ii) of this section differs from the aggregate target cost of such supplies or services; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amount applied or to be applied to liquidate progress payments).

(3) Notwithstanding any provision of this contract authorizing greater payment, if on any quarterly statement the amount of (g)(2)(iv) of this section exceeds the sum of paragraph (g)(2) (i), (ii), and (iii) of this section, the contractor shall immediately refund or credit to the Government against existing unpaid invoices or vouchers covered by such statement the amount of such excess less (i) the cumulative total of any previous refunds or credits under this clause (exclusive of any tax credits under Section 1481 of the Internal Revenue Code of 1954) and (ii) any applicable tax credits under Section 1481 of the Internal Revenue Code of 1954. If any portion of such excess has been applied to the liquidation of progress payments, such amount (less all tax credits under the Internal Revenue Code) may be added or restored to the unliquidated progress payment account, to the extent consistent with the "Progress Payments" clause of this contract, instead of direct refund thereof.

(4) The Contractor shall (i) insert in each price redetermination or incentive price revision subcontract hereunder the substance of this paragraph (g), including this subparagraph (4), modified to omit mention of the Government and reflect the position of the Contractor as purchaser and of the subcontractor as vendor, and to omit that portion of subparagraph (g)(3) relating to tax credits, and (ii) include in each cost-reimbursement subcontract hereunder a requirement that each price redetermination and incentive price revision subcontract thereunder will contain the substance of this paragraph (g), including this subparagraph (4) modified as provided in paragraph (g)(4)(i) of this section.

(h) *Disagreements.* If the Contractor and the Contracting Officer fail to agree upon the total final price within 60 days after the date on which the data required by (c) of this section are to be submitted, or within such further time as may be specified by the Contracting Officer, such failure to agree shall be deemed to be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract and the Contracting Officer shall promptly issue a decision thereunder.

(i) *Termination.* If this contract is terminated prior to establishment of the total price, prices of supplies or services subject to price revision under this clause shall be established pursuant to this clause for (1) completed supplies accepted by the Government, and services performed and accepted by the Government, and (2) in the event of a partial termination, supplies and services which are not terminated. The termination shall be otherwise accomplished pursuant to other applicable provisions of this contract.

(j) *Equitable Adjustment Under Other Clauses.* If an equitable adjustment in contract price is made under any other clause of this contract before the total final price is established, the adjustment shall be made in the total target cost and may be made in the maximum dollar limit on the total final price, the total target profit or both. If such an adjustment is made after the total final price is established, adjustment shall be made only in the total final price.

(k) *Exclusion from Target Price and Total Final Price.* Whenever any clause of this contract provides that the contract price does not or will not include an amount for a specific purpose, such provision shall mean that neither any target price nor the total final price includes or will include any amount for such purpose.

(l) *Separate Reimbursement.* The cost of performance of an obligation that any clause of this contract expressly provides is at Government expense shall not be included in any target price or in the total final price, but shall be reimbursed separately.

(m) *Taxes.* As used in the "Federal, State, and Local Taxes" clause of this contract or any other clause of this contract that provides for certain taxes or duties to be included in, or excluded from, the contract price, the term "contract price" includes the total target price, or if it has been established, the total final price. When a provision in such clause or clauses requires that the contract price be increased or decreased as a result of changes in the obligation of the Contractor to pay or bear the burden of certain taxes or duties, such increase or decrease shall be made in the total target price or, if it has been established in the total final price, so as not to affect the contractor's profit or loss on this contract.

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§9-7.103 Clauses to be used when applicable.

This section prescribes modifications to certain clauses in FPR 1-7.103 and provides DOE clauses which shall be used when applicable in addition to or in place of counter part clauses in FPR 1-7.103.

§9-7.103-3 Examination of records by Comptroller General.

Modify FPR 1-7.103-3 as follows:

Add the following as paragraph (c):

> "Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract."

§9-7.103-4 Notice and assistance regarding patent and copyright infringement.

Insert the clause set forth in §9-9.104 under the conditions set forth therein.

§9-7.103-28 Subcontracts.

Modify FPR 1-7.103-28, paragraph (c) (v), to read as follows: "Identification of the type of subcontract to be used, and a copy of the proposed subcontract if it either exceeds $100,000 or is otherwise required by the Contracting Officer."

§9-7.103-50 Classification.

The following clause shall be included in all contracts which involve classified information:

CLASSIFICATION

In the performance of the work under this contract, the contractor shall assign classifications to all documents, material, and equipment originated or generated by the contractor in accordance with classification guidance furnished to the contractor by the DOE. Every subcontract and purchase order issued hereunder involving the origination or generation of classified documents, material, or equipment, shall include a provision to the effect that in the performance of such subcontract or purchase order, the subcontractor or supplier shall assign classifications to all such documents, material and equipment in accordance with classification guidance furnished to such subcontractor or supplier by the contractor.

§9-7.103-51 Government Property.

Insert the applicable Government property clause set forth in FPR 1-7.303-7 modified as set forth in §9-7.303-7.

§9-7.103-52 Patent rights (long form).

Insert the clause set forth in §9-9.107-5(a) under the conditions contained in §9-9.107-4(a).

§9-7.103-53 Security.

The following clause is required in contracts entered into under sections 31 (research assistance) or 41 (ownership and operation of production facilities) of the Atomic Energy Act, as amended, and in other contracts and subcontracts, the performance of which involved or is likely to involve restricted data, formerly restricted data, or other classified information.

SECURITY

(a) contractor's duty to safeguard restricted data, formerly restricted data, and other classified information. The contractor shall, in accordance with DOE security regulations and requirements, be responsible for safeguarding restricted data, formerly restricted data, and other classified information and protecting against sabotage, espionage, loss and theft, the classified documents and material in the contractor's possession in connection with the performance of work under this contract.Except as otherwise expressly provided in this contract, the contractor shall, upon completion or termination of this contract, transmit to DOE any classified matter in the possession of the contractor or any person under the contractor's control in connection with performance of this contract.If retention by the contractor of any classified matter is required after the completion or termination of the contract and such retention is approved by the Contracting Officer the contractor will complete a certificate of possession to be furnished to DOE specifying the classified matter to be retained. The certification shall identify the items and types or categories of matter retained, the conditions governing the retention of the matter, and the period of retention, if known. If the retention is approved by the Contracting Officer, the security provisions of the contract will continue to be applicable to the matter retained.

(b) Regulations. The contractor agrees to conform to all security regulations and requirements of DOE.

(c) Definition of restricted data. The term "restricted data", as used in this clause, means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the restricted data category pursuant to section 142 of the Atomic Energy Act of 1954, as amended.

(d) Definition of formerly restricted data. The term "formerly restricted data", as used in this clause, means all data removed from the restricted data category under section 142 d of the Atomic Energy Act of 1954, as amended.

(e) Security clearance of personnel. The contractor shall not permit any individual to have access to restricted data, formerly restricted data, or other classified information, except in accordance with the Atomic Energy Act of 1954, as amended, and the DOE's regulations or requirements applicable to the particular type or category of classified information to which access is required.

(f) Criminal liability. It is understood that disclosure of restricted data, formerly restricted data, or other classified information relating to the work or services ordered hereunder to any person not entitled to receive it, or failure to safeguard any restricted data, formerly restricted data, or any other classified matter that may come to the contractor or any person under the contractor's control in connection with work under this contract, may subject the contractor, its agents, employees, or subcontractors to criminal liability under the laws of the United States. (See the Atomic Energy Act of 1954, as amended, 42 USC 2100 et seq.: 18 USC 793 and 794; and Executive Order 11652 as amended.)

(g) Subcontracts and purchase orders.Except as otherwise authorized in writing by the contracting officer, the contractor shall insert provisions similar to the foregoing in all subcontracts and purchase orders under this contract.

§9-7.103-54 Organizational conflicts of interest.

The appropriate clauses contained in §9-1.54 may be used under the conditions set forth therein.

§9-7.103-55 Safety and health.

Insert the clause set forth in §9-50.704-2 where appropriate.

§9-7.103-56 Preservation of individual occupational radiation exposure records.

Insert the clause set forth in §9-50.704-41 where appropriate.

§9-7.103-57 Subcontracting plan for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

Insert the clause set forth in §9-1.710-3(c) where appropriate.

§9-7.104 Additional clauses.

This subpart provides DOE clauses for use as needed.

§9-7.104-50 Priorities, allocations, and allotments.

The following clause may be used only in contracts and orders for military and atomic energy production and directly related activity, and supply contracts directly related thereto, where the programs have been authorized pursuant to the Atomic Energy Act, as amended.

PRIORITIES, ALLOCATIONS, AND ALLOTMENTS

The contractor shall follow the provisions of DMS Regulation 1 and all other applicable regulations and orders of the Industry and Trade Administration, Department of Commerce in obtaining controlled materials and other products and materials needed to fill this order.

§9-7.104-51 Permits and licenses.

The following clause may be used if permits or licenses will be required to perform the contract.

PERMITS AND LICENSES

Except as otherwise directed by the Contracting Officer, the contractor shall procure all necessary permits or licenses and abide by all applicable laws, regulations and ordinances of the United States and of the State, territory, and political subdivision in which the work under this contract is performed.

§9-7.104-52 Nuclear hazards indemnity.

Insert the clauses set forth in §9-50.704-6, §9-50.704-7 and §9-50.704-8 where appropriate.

Subpart 9-7.2 Cost-Reimbursement Type Supply Contracts

§9-7.200 Scope of subpart.

This subpart supplements FPR 1-7.2.

§9-7.202 Required clauses.

FPR 1-7.202 sets forth required clauses. This section prescribes modifications to certain of these FPR required clauses, and establishes additional DOE required clauses.

§9-7.202-1 Definitions.

Insert the modification set forth in §9-7.102-1.

Insert the clause set forth in FPR 1-7.103-3, modified as set forth in §9-7.103-3.

§ 9-7.202-2 Changes.

If the contract is a cost plus award fee type, the references to fixed fee in the clause set forth at FPR 1-7.202-2 should be modified to read base fee and award fee.

§9-7.202-4 Allowable cost, fee, and payment.

Insert the clause set forth in FPR 1-7.202-4 modified to add "As supplemented or modified by DOE-PR 9-15.2 (41 CFR 9-15.2)," after the reference (41 CFR 1-15.2) in paragraph (a)(1)(i), in all cost reimbursement type supply contracts which provide for the payment of a fixed fee.

Insert the clause set forth below in all cost reimbursement type supply contracts which provide for an incentive fee arrangement. (When an incentive contract contains an "Indemnification" clause in accordance with § 9-10.50, an item (vi) which reads "any claim, loss, or damage resulting from a risk defined in the contract as unusually hazardous or as a nuclear risk, against which the Government has expressly agreed to indemnify the Contractor," should be added to paragraph (j).)

Allowable Cost, Incentive Fee, and Payment

(a) *Allowable cost and fee.* (1) For the performance of this contract, the Government shall pay to the Contractor:

(i) The cost thereof (hereinafter referred to as "allowable cost") determined by the Contracting Officer to be allowable in accordance with:

(A) Subpart 1-15.2 of the Federal Procurement Regulations (41 CFR 1-15.2), as supplemented or modified by DOE-PR 9-15.2 (41 CFR 9-15.2), in effect on the date of contract; and

(B) The terms of this contract; and

(ii) A fee determined as provided in this contract.

(2) The target cost and target fee of this contract are set forth in the Schedule and shall be subject to adjustment in accordance with (h) and (i) below. As used throughout this contract the terms:

(i) "Target cost" means the estimated cost of this contract initially negotiated, adjusted in accordance with (h) below; and

(ii) "Target fee" means the fee which was initially negotiated, on the assumption that this contract would be performed for a cost equal to the estimated cost of this contract initially negotiated, adjusted in accordance with (i) below.

(b) *Payments.* Payments shall be made to the Contractor when requested as work progresses, but not more frequently then biweekly, in amounts approved by the Contracting Officer. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as such representative may require, an invoice or public voucher supported by a statement of cost for the performance of this contract and claimed to constitute allowable cost. For this purpose, except as provided herein with respect to pension contributions, the term "cost" shall include only those recorded costs which result, at the time of the request for reimbursement, from payment by cash, check, or other form of actual payment for items or services purchased directly for the contract, together with (when the Contractor is not delinquent in payment of costs of contract performance in the ordinary course of business) costs incurred, but not necessarily paid, for materials which have been issued from the Contractor's stores inventory and placed in the production process for use on the contract, for direct labor, for direct travel, for other direct in-house costs, and for properly allocable and allowable indirect costs, as shown by records maintained by the Contractor for purposes of obtaining reimbursement under government contracts, plus the amount of progress payments which have been paid to Contractor's subcontractors under similar cost standards. In addition, when pension contributions are paid by the Contractor to the retirement fund less frequently than quarterly, accrued costs therefore shall be excluded from indirect costs for payment purposes until such costs are paid. If pension contributions are paid on a quarterly or more frequent basis, accruals therefore may be included in indirect costs for payment purpose: *Provided*, That they are paid to the fund within thirty (30) days after the close of the period covered. If payments are not made to the funds within such 30-day periods, pension contribution costs shall be excluded from indirect costs for payment purposes until payment has been made. The restriction on payment for items or services purchased directly for the contract shall not apply where the Contractor is a small business concern.

(c) *Amounts Withheld.* Promptly after receipt of each invoice or voucher and statement of costs, the Government shall, except as otherwise provided in this contract, subject to the provisions of (d) below, make payment thereon as approved by the Contracting Officer. Normally, payment of fee shall be made to the Contractor as specified in the Schedule. However, when in the opinion of the Contracting Officer, the Contractor's performance or cost indicates that target cost will not be achieved, the Government shall pay on the basis of such lesser fee as may be appropriate. Further, when the Contractor demonstrates that its performance or cost clearly indicates that it will earn a fee significantly in excess of target fee, the Government may, in the sole discretion of the Contracting Officer, pay on the basis of such higher fee as may be appropriate. After payment of eighty-five percent (85%) of the applicable fee, the Contracting Officer may withhold further payment of fee until a reserve shall have been set aside in an amount which the Contracting Officer considers necessary to protect the interests of the Government, but such reserve shall not exceed fifteen percent (15%) of the total applicable fee or one hundred thousand dollars ($100,000) whichever is less.

(d) *Audits.* At any time or times prior to final payment under this contract, the Contracting Officer may have the invoices or vouchers and statements of cost audited. Each payment theretofore made shall be subject to reduction for amounts included in the related invoice or voucher which are found by the Contracting Officer, on the basis of such audit, not to constitute allowable cost. Any payment may be reduced for overpayments, or increased for underpayments, on preceding invoices or vouchers.

(e) *Final Payments.* On receipt and approval of the invoice or voucher designated by the Contractor as the "completion invoice" or "completion voucher" and upon compliance by the Contractor with all the provisions of this contract (including without limitation, the provisions relating to patents and the provisions of (f) below, the Government shall promptly pay to the Contractor any balance of allowable cost, and any part of the fee, which has been withheld pursuant to (c) above or otherwise not paid to the Contractor. The completion invoice or voucher shall be submitted by the Contractor promptly following completion of the work under this contract but in no event later than one (1) year (or such longer period as the Contracting Officer may in his discretion approve in writing) from the date of such completion.

(f) *Refunds, Rebates and Credits.* The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government, to the extent that they are properly allocable to costs for which the Contractor has been reimbused by the Government under this contract. Reasonable expenses incurred by the Contractor for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable cost hereunder when approved by the Contracting Officer. Prior to final payment under this contract, the Contractor and each assignee under this contract whose assignment is in effect at the time of final payment under this contract shall execute and deliver:

(i) An assignment to the Government, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including any interest thereon) properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract; and

(ii) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions:

(A) Specified claims in stated amounts or in estimated amounts where the amount are not susceptible of exact statement by the Contractor;

(B) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the Contractor to third parties arising out of the performance of this contract; *Provided, however,* That such claims are not known to the Contractor on the date of the execution of the release; *And provided further,* That the Contractor gives notice of such claims in writing to the Contracting Officer not more than six (6) years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier; and;

(C) Claims for reimbursement of costs (other than expenses of the Contractor by reason of his indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of this contract relating to patents.

Except as provided in (j) below, payments under the assignment and claims excepted from the release shall be subject to adjustment by reason of the adjustment of fee in accordance with (i) below.

(g) *Order of Precedence.* Any cost incurred by the Contractor under the terms of this contract which would constitute allowable cost under the provision of this clause shall be included in determining the amount payable under this contract, notwithstanding any provisions contained in the specifications or other documents incorporated in this contract by reference, designating services to be performed or material to be furnished by the Contractor at his expense or without cost to the Government.

(h) *Modifications.* When the work under this contract (including any supplies or services which are ordered separately under, or otherwise added to, this contract) is increased or decreased by contract modification or when any equitable adjustment in the target cost is authorized under any other clause of this contract, equitable adjustments in the target cost, target fee, minimum fee, maximum fee or any or all of them, as appropriate, shall be set forth in an amendment or supplemental agreement to this contract.

(i) *Fee Formula.* The fee payable hereunder shall be the target fee increased by (insert contractor's participation) cents for every dollar by which the total allowable cost is less than the target cost or decreased by (insert contractor's participation) cents for every dollar by which the total allowable cost exceeds the target cost. In no event shall the fee be greater than * * * percent nor less than * * * percent, of the target cost; and, except as provided in (j) below, within these limits such fee shall be subject to adjustment, by reason of increase or decrease of total allowable cost, on account of payments under the assignment required by (f) (i) above, and claims excepted from the release required by (f) (ii) above. If this contract is terminated in its entirety, the portion of the target fee payable shall not be subject to an increase or decrease as provided in this paragraph. The termination shall be otherwise accomplished pursuant to other applicable provisions of this contract.

(j) *Total Allowable Cost.* For the purpose of the adjustment of the fee in accordance with (i) above, the term "total allowable cost" shall not include allowable costs arising out of:

(i) Any of the causes covered by the clause hereof entitled "Excusable Delays" to the extent they are beyond the control and without the fault or negligence of the Contractor or any subcontractor;

> (ii) The taking effect, after the negotiation of the target cost of this contract, of a statute, court decision, written ruling, or regulation which results in the Contractor's being required to pay or bear the burden of any tax or duty or increase in the rate thereof;
>
> (iii) Any direct cost attributed to the Contractor's assistance or participation in litigation as required by the Contracting Officer pursuant to a provision of this contract, including the furnishing of evidence and information requested pursuant to the clause hereof entitled "Notice and Assistance Regarding Patent and Copyright Infringement";
>
> (iv) The reprocurement and maintenance of additional insurance not included in the target cost and required by the Contracting Office or claims for reimbursement for liabilities to third persons pursuant to the clause hereof entitled "Insurance Liability to Third Persons"; and
>
> (v) Any claim, loss or damage resulting from a risk for which the Contractor has been relieved of liability pursuant to the clause hereof entitled "Government Property."
>
> Except as otherwise specifically provided in this contract, all other allowable costs shall be included in the term "total allowable cost" for the purpose of the adjustment of the fee in accordance with (i) above.
>
> (k) *Documentation.* The total allowable cost and the adjusted fee determined as provided in this clause shall be evidenced by a modification of this contract signed by the Contractor and Contracting Officer.

Insert the clause set forth in FPR 1–7.202–4 as modified above and in accordance with § 9–3.405–50(h) in all cost reimbursement type supply contracts which provide for the payment of a base fee and award fee. Insert the clause set forth in FPR 1–7.202–4 as modified per provisions of FPR 1–7.402–3(b) and as above, in all cost reimbursement type supply contracts that will be without fee and/or a cost sharing contract.

§9–7.202–7 Examination of records by Comptroller General.

Insert the clause set forth in FPR 1–7.103–3, modified as set forth in §9–7.103.3.

§9–7.202–8 Subcontracts.

Modify FPR 1–7.202–8, paragraph (b) (5), to read as set forth in §9–7.103–28.

§9–7.202–10 Termination for default or convenience of the Government.

Modify FPR 1–8.702, paragraph (f), as set forth in §9–7.102–19.

§9–7.202–24 Notice and assistance regarding patent and copyright infringement.

Substitute the clause prescribed by §9–9.104 under the conditions set forth therein in lieu of FPR 1–7.202–24.

§9–7.202–50 Order of precedence.

Insert the clause set forth in §9–7.102–50.

§ 9–7.202–51 (Reserved)

§9–7.202–52 Patent indemnity.

Insert the clause in §9–9.103–3(b) under the conditions contained in §9–9.103.

§9–7.202–53 Reporting of royalties.

Insert the clause prescribed by §9–9.110 under the circumstances set forth therein.

§9-7.202-54 Authorization and consent.

The clause set forth in Section 9-9.102-1 shall be used under the conditions set forth therein.

§9-7.202-59 Stop work order.

> (a) The Contracting Officer may at any time, by written order to the contractor require the contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the contractor, and for any further period to which the parties may agree. Any such order shall be specifically identified as a stop work order issued pursuant to this clause. Upon receipt of such an order, the contractor shall forthwith comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop work order is delivered to the contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either:
>
> (1) cancel the stop work order, or
>
> (2) terminate the work covered by such order as provided in the "Termination for Default or for Convenience of the Government" clause of this contract.
>
> (b) If a stop work order issued under this clause is cancelled or the period of the order or any extension thereof expires, the contractor shall resume work. An equitable adjustment shall be made in the delivery schedule, the estimated cost, the fee, (if any), or a combination thereof, and in any other provisions of the contract that may be affected, and the contract shall be modified in writing accordingly, if:
>
> (1) the stop work order results in an increase in the time required for, or in the contractor's cost properly allocable to, the performance of any part of this contract, and
>
> (2) the contractor asserts a claim for such adjustments within 30 days after the end of the period of work stoppage; provided that, if the Contracting Officer decides the facts justify such action, he may receive and act upon any such claim asserted at any time prior to final payment under this contract.
>
> (c) If a stop work order is not cancelled and the work covered by such order is terminated for default, the reasonable costs resulting from the stop work order shall be allowed by equitable adjustment or otherwise.

§9-7.203 Clauses to be used when applicable.

This section prescribes modifications to certain clauses in FPR 1-7.203 and provides DOE clauses which shall be used when applicable in addition to the clauses in FPR 1-7.203.

§9-7.203-9 Negotiated overhead rates.

Insert the clause set forth in FPR 1-3.704-1. Add the following phrase in the third line of paragraph (c): "the applicable cost principles referenced in the Allowable Cost, Fee, and Payment clause".

§9-7.203-21 Government property.

Insert the Government property clause set forth in FPR 1-7.203-21(a) modified as set forth below:

(1) Modify the second sentence of paragraph (d) to read as follows:

"The Contractor shall establish and maintain a system to control, protect, preserve, and maintain all Government property in accordance with applicable provisions of the DOE Property Management Regulations (DOE-PMR) 41 CFR 109-60 as in effect on the date of the contract."

(2) Modify the first sentence of paragraph (f) to read as follows:

"The Contractor shall maintain and administer, in accordance with sound industrial practice and with applicable provisions of DOE-PMR 109-60, a program for the utilization, maintenance, repair, protection, and preservation of Government property so as to assure its full availability and usefulness for the performance of this contract."

§9-7.203-50 Classification.

Insert the clause in §9-7.103-50 under the conditions set forth therein.

§9-7.203-51 Patent rights (long form).

Insert the clause set forth in §9-9.107-5(a) under the conditions set forth in §9-9.107-4(a).

§9-7.203-52 Additional technical data requirements.

Insert the clause set forth in §9-9.202-3(c) under the conditions contained in §9-9.202-3(b).

§9-7.203-53 Security.

Insert the clause in §9-7.103-53 under the conditions set forth therein.

§9-7.203-54 Rights in technical data.

Insert the clause set forth in §9-9.202-3(e)(2) under the conditions contained in §9-9.202-3(e)(1).

§9-7.203-55 Safety and health.

Insert the clause set forth in §9-50.704-2 where appropriate.

§9-7.203-56 Organizational conflicts of interest.

The appropriate clauses contained in §9-1.54 may be used under the conditions set forth therein.

§9-7.203-57 Preservation of individual occupational radiation exposure records.

Insert the clause set forth in §9-50.704-41 where appropriate.

§9-7.203-58 Subcontracting plan for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

Insert the clause set forth in §9-1.710-3(c) where appropriate.

§ 9-7.203-59 Cost and schedule control systems.

Certain DOE projects are of such significance and magnitude that responsible management calls for enhanced visibility of contractor cost and schedule performance as well as more formalized data to document their progress and to aid in decisions regarding their continuation. Any contract with a total estimated cost in excess of $50 million shall require full implementation of the DOE Cost and Schedule Control Systems Criteria. Selected projects between $2 million and $50 million may benefit from modified implementation of such a control system. In those instances where the DOE Cost and Schedule Control System Criteria are to be utilized, the Contracting Officer shall provide for this by including the "Cost and Schedule Control Systems Criteria for Contract Performance Measurement—Implementation Guide," Office of the Controller Publication CR-0015, in the solicitation and shall include the following clause in the contract:

Cost and Schedule Control Systems

(a) In the performance of this contract, the contractor shall establish, maintain, and use cost and schedule control systems (management control systems) meeting the criteria set forth in the contract and as described in detail in DOE/CR-0015, "Cost and Schedule Control Systems Criteria for Contract Performance Measurement—Implementation Guide," annexed hereto and hereinafter referred to as the "Guide." Prior to acceptance by the Contracting Officer and within ——— calendar days after contract award, the contractor shall be prepared to demonstrate systems operation to the Government to verify that the proposed systems meet the designated criteria. As a part of the review procedures, the contractor shall furnish the Government a description of the cost and schedule control systems applicable to this contract in such form and detail as indicated by the Guide, or as required by the Contracting Officer. The contractor agrees to provide access to all pertinent records, data, and plans as requested by representatives of the Government for the conduct of systems review.

(b) The description of the management control systems accepted by the Contracting Officer, identified by title and date, shall be referenced in the contract. Such systems shall be maintained and used by the contractor in the performance of this contract.

(c) Contractor changes to the reviewed systems shall be submitted for review and approval as required by the Contracting Officer. When Contracting Officer approval is required, the Contracting Officer shall advise the contractor of the acceptability of such changes within sixty (60) days after receipt from the contractor. When systems existing at the time of contract award do not comply with the designated criteria, adjustments necessary to assure compliance will be made at no change in contract price or fee.

(d) The contractor agrees to provide access to all pertinent records and data requested by the Contracting Officer, or duly authorized representative, for the purpose of permitting Government surveillance to insure continuing application of the accepted systems to this contract. Deviations from the systems description identified during contract performance shall be corrected as directed by the Contracting Officer.

(e) The contractor shall require that each selected subcontractor, as mutually agreed to between the Government and the contractor and as set forth in the schedule of this contract, meet the criteria for cost and schedule control systems as set forth in subcontract and shall incorporate in all such subcontracts adequate provisions for review and surveillance of subcontractor's systems to be carried out by the prime contractor, or by the Government when requested by either the prime or subcontractor.

§9-7.204 Additional clauses.

This section provides DOE clauses for use as needed.

§9-7.204-5 Insurance liability to third persons.

Insert the clause in FPR 1-7.204-5 with the following modification in paragraph (c). Change (c) to (d) and insert a new (c) as follows: "(c) for which appropriated funds are not available, or"

§9-7.204-50 Priorities, allocations, and allotments.

The clause in §9-7.104-50 may be used under the conditions set forth therein.

§9-7.204-51 Permits and licenses.

The clause in §9-7.104-51 may be used under the conditions set forth therein.

§9-7.204-52 Nuclear hazards indemnity.

Insert the clauses set forth in §9-50.704-6, §9-50.704-7 and §950.704-8 where appropriate.

Subpart 9–7.3 Fixed-Price Research and Development Contracts

§9–7.300 Scope of subpart.

This subpart supplements FPR 1–7.3.

§9–7.302 Required clauses.

FPR 1–7.302 sets forth required clauses. This section prescribes modifications to certain of these FPR required clauses and establishes additional DOE required clauses.

§9–7.302–1 Definitions.

Insert the clause and modification set forth in §9–7.102–1.

§9–7.302–6 Examination of records by Comptroller General.

Insert the clause prescribed by FPR 1–7.103–3, modified as set forth in §9–7.103–3.

§9–7.302–10 Termination for convenience of the Government.

Modify FPR 1–8.701, paragraph (f) or FPR 1–8.704–1, paragraph (d), as set forth in §9–7.102–19.

§9–7.302–22 Notice and assistance regarding patent and copyright infringement.

Substitute the clause prescribed by §9–9.104 under the conditions set forth therein for FPR 1–7.302–22.

§9–7.302–23 Patents.

Substitute either of the clauses referenced in §9–7.302–53 in lieu of FPR 1–7.302–23.

§9–7.302–29 Pricing of adjustments.

Insert the clause prescribed by FPR 1–7.102–20, modified as set forth in §9–7.102–20.

§9–7.302–50 Order of precedence.

Insert the clause set forth in §9–7.102–50.

§ 9–7.302–51 (Reserved)

§9–7.302–52 Authorization and consent.

Insert the clause prescribed by §9–9.102–2 under the conditions set forth therein.

§9–7.302–53 Patent rights.

Insert either the clause set forth in §9–9.107–5(a), or the clause prescribed by §9–9.106–6, in accordance with the conditions contained in §9–9.107–4(a).

§9–7.302–54 Additional technical data requirements.

Insert the clause set forth in §9–9.202–3(c) under the conditions contained in §9–9.202–3(b).

§9–7.302–55 Rights in technical data - long form.

Insert the clause prescribed by §9–9.202–3(e)(2) under the conditions contained in §9–9.202–3(e)(1).

§9-7.302-56 Reporting of royalties.

Insert the clause prescribed by §9-9.110 under the conditions set forth therein.

§9-7.302-57 Printing.

Insert the following clause:

PRINTING

Unless otherwise specified in this contract, the contractor shall not engage in, nor subcontract for, any printing (as that term is defined in title I of the Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with the performance of work under this contract, provided, however, that performance of a requirement under this contract involving the reproduction of less than 5,000 production units of any one page, or less than 25,000 production units in the aggregate of multiple pages, will not be deemed to be printing. A production unit is defined as one sheet, size 8½ by 11 inches, one side only, one color.

§9-7.302-58 Federal Reports Act.

Insert the following clause:

FEDERAL REPORTS ACT

(a) In the event that it subsequently becomes a contractual requirement to collect or record information calling either for answers to identical questions from 10 or more persons other than Federal employees, or information from Federal employees which is to be used for statistical compilations of general public interest, the Federal Reports Act shall apply to this contract, No plan, questionnaire, interview guide, or other similar device for collecting information (whether repetitive or single-time) may be used without first obtaining clearance from the Office of Management and Budget (OMB).

(b) The contractor shall request the required OMB clearance from the Contracting Officer before expending any funds or making public contacts for the collection of data. The authority to expend funds and to proceed with the collection of data shall be in writing by the Contracting Officer.The contractor must plan at least 90 days for OMB clearance. Excessive delay caused by the Government which arises out of causes beyond the control and without the fault or negligence of the contractor will be considered in accordance with the clause entitled "Excusable Delays," if such clause is applicable. If not, the period of performance may be extended pursuant to this clause if approved by the Contracting Officer.

OMB CONTROL NO.: 1901—0021.

§ 9-7.302-59 Incentive Price Revision Clause (Firm Target).

Include the clause set forth in 9-7.102-56 when a fixed price incentive contract described in FPR 1-3.404-4(a)(2) is used.

§9-7.303 Clauses to be used when applicable.

This section prescribes modifications to certain clauses in FPR 1-7.303 and provides DOE clauses which shall be used when applicable, in addition to the clauses in FPR 1-7.303.

§9-7.303-7 Government property.

(1) Insert the applicable Government property clause set forth in FPR 1-7.303-7 (a) modified as set forth below:

(a) Modify the second sentence of paragraph (d) to read as follows:

"The Contractor shall establish and maintain a system to control, protect, preserve, and maintain all Government property in accordance with applicable provisions of the DOE Property Management Regulations (DOE-PMR) 41 CFR 109-60 as in effect on the date of the contract."

(b) Modify the first sentence of paragraph (f) to read as follows:

"The Contractor shall maintain and administer, in accordance with sound industrial practice and with applicable provisions of DOE-PMR 109-60, a program for the utilization, maintenance, repair, protection, and preservation of Government property so as to assure its full availablity and usefulness for the performance of this contract."

(2) When the contract is without profit or fee and is with an educational or nonprofit institution, insert the property clause set forth in FPR 1-7.303-7(d) modified as set forth below:

(a) Modify the second sentence of paragraph (d) to read as follows:

"The Contractor shall establish and maintain a system to control, protect, preserve, and maintain all Government property in accordance with applicable provisions of the DOE Property Management Regulations (DOE-PMR) 41 CFR 109-60 as in effect on the date of this contract."

(b) Modify the first sentence of paragraph (f) to read as follows:

"The Contractor shall maintain and administer, in accordance with sound business practice and with applicable provisions of DOE-PMR 109-60, a program for the utilization, maintenance, repair, protection, and preservation of Government property so as to assure its full availability and usefulness for the performance of this contract."

§9-7.303-12 Subcontracts.

Modify FPR 1-7.303-12, paragraph (v), to read as set forth in §9-7.103-28.

§9-7.303-50 Patent indemnity.

Insert the clause set forth in §9-9.103-(b) under the conditions contained in §9-9.103.

§9-7.303-52 Limitation of Government's obligation.

The clause set forth below is authorized for use when funds are not available to fund the total fixed price of the contract at the time of entering into the contract and the initial funding of the contract is not less than 50 percent of the total fixed price. The foregoing circumstances may occur when less than full funding is provided from Headquarters to a field office via a Headquarters financial plan. Notwithstanding the grant of authority to use the clause under the foregoing circumstances, it is emphasized that fixed-price contracts shall be fully funded wherever possible and that, accordingly, incremental funding of such contracts should be kept to the absolute minimum. Contracting Officers are authorized, in appropriate cases, to revise paragraphs (a) and (b) of the clause to specify the work required under the contract in lieu of contract item numbers.

LIMITATION OF GOVERNMENT'S OBLIGATION

(a) Of the total price of items _______ through _______, the sum of $_______ is presently available for payment and contract. It is anticipated that from time to time additional funds will be allotted to this contract in accordance with the following schedule until the total price of said items is allotted.

SCHEDULE FOR
DATE AMOUNTS

(b) The contractor agrees to perform or have performed work on said items up to the point at which, in the event of termination of this contract pursuant to the clause hereof entitled "Termination for Convenience of the Government," the total amount payable by the Government, (including amounts payable in respect of subcontracts and settlement costs) pursuant to paragraph (e) thereof, would in the exercise of reasonable judgment by the contractor approximate the total amount at the time allotted to the contract. The Government shall not be obligated in any event to pay or reimburse the contractor in excess of the amount from time to time allotted to the contract, anything to the contrary in the clause hereof entitled "Termination for Convenience of the Government" notwithstanding.

(c) It is contemplated that funds presently allotted to this contract will cover the work to be performed until _______. In the event funds allotted are considered by the contractor to be inadequate to cover the work to be performed until the above date, or an agreed date in substitution thereof, the contractor shall notify the Contracting Officer in writing when within the next thirty days the work will reach a point at which, in the event of termination of this contract pursuant to the clause hereof entitled "Termination for Convenience of the Government," the total amount payable by the Government (including amounts payable in respect of subcontracts and settlement costs) pursuant to paragraph (e) thereof, will approximate 85 percent of the total amount then allotted to the contract. The notice shall state the estimated date when such point will be reached and the estimated amount of additional funds required to continue performance to the above or an agreed substituted date. The contractor shall, thirty days prior to the date above the written or agreed substituted date, advise the Contracting Officer in writing as to the estimated amount of additional funds which will be required for the timely performance of the contract for a further period, as may be specified in the contract or otherwise agreed to by the parties. If after such latter notification, additional funds are not allotted by the date above written or by an agreed date in substitution thereof, the Contracting Officer will, upon written request of the contractor, terminate this contract on such date or the date set forth in the request, whichever is later, pursuant to the provisions of the clause of this contract entitled "Termination for Convenience of the Government." (Subpart 9-7.2 Cost-Reimbursement Type Supply Contracts)

(d) When additional funds are alloted from time to time for continued performance of the work under this contract, the parties shall agree on the applicable period of contract performance which shall be covered by such funds. The provisions of paragraphs (b) and (c) above shall apply to such additional allotted funds and substituted date pertaining thereto and the contract amended accordingly.

(e) If the contractor incurs additional costs, or is delayed in the performance of the work under this contract, solely by reason of the failure of the Government to allot additional funds in amounts sufficient for the timely performance of this contract, and if additional funds are allotted, an equitable adjustment shall be made in the price or prices (including appropriate target, billing and ceiling prices where applicable) of said items or in the time of delivery or both. Failure to agree to any such equitable adjustment hereunder shall be a dispute concerning a question of fact within the meaning of the clause in this contract entitled "Disputes."

(f) The Government may at any time prior to termination, and with the consent of the contractor, after notice of termination, allot additional funds for this contract.

(g) Nothing in this clause shall affect the right of the Government to terminate this contract pursuant to the clause of this contract entitled "Termination for Convenience of the Government."

§9-7.303-53 Security.

(a) Insert the clause in §9-7.103-53 under the conditions set forth therein.

(b) See Note A of §9-50.704-5.

§9-7.303-54 Organizational conflicts of interest.

The appropriate clauses contained in §9-1.54 may be used under the conditions set forth therein.

§9-7.303-55 Safety and health.

Insert the clause set forth in §9-50.704-2 where appropriate.

§9-7.303-56 Preservation of individual occupational radiation exposure records.

Insert the clause set forth in §9-50.704-41 where appropriate.

§9-7.303-57 Subcontracting plan for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

Insert the clause set forth in **§9-1.710-3(c) where appropriate.**

§9-7.304 Additional clauses.

This section provides DOE clauses for use as needed.

§9-7.304-50 Priorities, allocations, and allotments.

The clause in §9-7.104-50 may be used under the conditions set forth therein.

§9-7.304-51 Permits and licenses.

The clause in §9-7.104-51 may be used under the conditions set forth therein.

§9-7.304-52 Soviet-Bloc controls.

The following clause may be used only in those unclassified research contracts with educational institutions which may involve making unclassified information about atomic energy available to certain foreign nations. The attachment referred to in the clause should set forth the applicable requirements of DOE Regulations on dissemination of unclassified published and unpublished technical information to foreign nations. This clause should not be used routinely in all research contracts with educational institutions which do not involve unclassified information about atomic energy.

SOVIET-BLOC CONTROLS

In connection with the contract activites, the contractor agrees to comply with the requirements set forth in Attachment ___________________ of this contract relating to the countries listed therein. From time to time, by written notice to the contractor, DOE shall have the right to change the listings of countries in Attachment ___________________ upon a determination by DOE that such change is in conformance with national policy. The contractor shall have the right to terminate its performance under this contract upon at least 60 days' prior written notice to DOE if the contractor determines that it is unable, without substantially interfering with its policies as an educational institution or without adversely affecting its performance, to continue performance of the work under this contract as a result of a change in Attachment ___________________ made by DOE pursuant to the preceding sentence. If the contractor elects to terminate performance, the provisions of this contract respecting termination for the convenience of the Government shall apply.

§9-7.304-53 Nuclear hazards indemnity.

Insert the clauses set forth in §9-50.704-6, §9-50.704-7 and §9-50.704-8 where appropriate.

Subpart 9-7.4 Cost-Reimbursement Type Research and Development Contracts.

§9-7.400 Scope of subpart.

This subpart supplements FPR 1-7.4.

§9-7.402 Required clauses.

FPR 1-7.402 sets forth required clauses. This section prescribes modifications to certain of these FPR required clauses, and establishes additional DOE required classes.

§9-7.402-1 Definitions.

Insert the clause and modifications set forth in §9-7.102-1.

§ 9-7.402-2 Limitation of cost or funds.

If a cost plus incentive fee contract or cost plus award fee contract is involved correct the references to fixed fee at the clause in FPR 1-7.402-2.

§9-7.402-3 Allowable cost, fee, and payment.

FPR 1-7.402-3 is supplemented as follows:

(c) Modify paragraph (a)(1)(i) of FPR 1-7.202-4 as set forth in §9-7.202-4.

(d) Insert the clause for Incentive contracts set forth in 9-7.202-4 in all cost reimbursement type R&D contracts which provide for an incentive fee arrangement.

(e) Insert the clause set forth in FPR 1.7.202.4 as modified with changes cited in DOE-PR 9-3.405-50(h) and the modification required in § 9-7.202-4 in all cost reimbursement R&D contracts which provide for the payment of a base fee and award fee.

§9-7.402-7 Examination of records by Comptroller General.

Insert the clause prescribed by FPR 1-7.103-3, modified as set forth in §9-7.103-3.

§9-7.402-8 Subcontracts.

Modify FPR 1-7.402-8, paragraph (b)(5), to read as set forth in §9-7.103-28.

§9-7.402-10 Termination for default or convenience of the Government.

Modify FPR 1-8.702, paragraph (f), or FPR 1-8.704-1, paragraph (d), as set forth in §9-7.102-19.

§9-7.402-21 Notice and assistance regarding patent and copyright infringement.

Insert the clause prescribed by §9-9.104 under the conditions set forth therein.

§9-7.402-22 Patents.

Substitute either of the clauses referenced in §9-7.402-53 in lieu of FPR 1-7.402-22.

§9-7.402-25 Government property.

(1) Insert the clause as set forth in FPR 1-7.203-21(a) modified as set forth in §9-7.203-21.

(2) If the contract is with an educational or nonprofit institution, insert the clause in FPR 1-7.402-25(b) modified as set forth below:

(a) Modify the second sentence of paragraph (d) to read as follows:

"The Contractor shall establish and maintain a system to control, protect, preserve, and maintain all Government property in accordance with applicable provisions of the DOE Property Management Regulations (DOE-PMR) 41 CFR 109-60 as in effect on the date of this contract."

(b) Modify the first sentence of paragraph (f) to read as follows:

"The Contractor shall maintain and administer, in accordance with sound business practice and with applicable provisions of DOE-PMR 109-60, a program for the utilization, maintenance, repair, protection, and preservation of Government property so as to assure its full availability and usefulness for the performance of this contract."

§9-7.402-50 Order of precedence.

Insert the clause set forth in §9-7.102-50.

§ 9-7.402-51 (Reserved)

§9-7.402-52 Authorization and consent.

Insert the clause prescribed by §9-9.102-2 under the conditions set forth therein

§9-7.402-53 Patent rights.

Insert either the clause set forth in §9-9.107-5(a), or the clause prescribed by §9-9.107-6, in accordance with the conditions contained in §9-9.107-4(a).

§9-7.402-54 Additional technical data requirements.

Insert the clause set forth in §9-9.202-3(c) under the conditions contained in §9-9.202-3(b).

§9-7.402-55 Rights in technical data - long form.

Insert the clause set forth in §9-9.202-3(e)(2) under the conditions contained in §9-9.202-3(e)(1).

§9-7.402-56 Reporting of royalties.

Insert the clause prescribed by §9-9.110 under the conditions set forth therein.

§9-7.402-57 Printing.

Insert the clause set forth in §9-7.302-57.

§9-7.402-58 Federal Reports Act.

Insert the clause set forth in §9-7.302-58.

§9-7.402-59 Stop work order.

Use of this clause is optional if the contract is for research and development being performed by an educational or nonprofit institution unless an operating or on-site contract is involved.

(a) The Contracting Officer may at any time, by written order to the contractor require the contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the contractor, and for any further period to which the parties may agree. Any such order shall be specifically identified as a stop work order issued pursuant to this clause. Upon receipt of such an order, the contractor shall forthwith comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop work order is delivered to the contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either:

(1) Cancel the stop work order, or

(2) Terminate the work covered by such order as provided in the "Termination for Default or for Convenience of the Government" clause of this contract.

(b) If a stop work order issued under this clause is cancelled or the period of the order or any extension thereof expires, the contractor shall resume work. An equitable adjustment shall be made in the delivery schedule, the estimated cost, the fee, (if any), or a combination thereof, and in any other provisions of the contract that may be affected, and the contract shall be modified in writing accordingly, if:

(1) the stop work order results in an increase in the time required for, or in the contractor's cost properly allocable to, the performance of any part of this contract, and

(2) the contractor asserts a claim for such adjustments within 30 days after the end of the period of work stoppage; provided that, if the Contracting Officer decides the facts justify such action, he may receive and act upon any such claim asserted at any time prior to final payment under this contract.

(c) If a stop work order is not cancelled and the work covered by such order is terminated for default, the reasonable costs resulting from the stop work order shall be allowed by equitable adjustment or otherwise.

§9-7.402-60 Foreign Travel.

(a) Foreign travel, when charged directly, shall be subject to the prior approval of the Contracting Officer for each separate trip regardless of whether funds for such travel are contained in an approved budget. Foreign travel is defined as any travel outside of Canada and the United States and its territories and possessions.

(b) Requests for approval shall be submitted at least 45 days prior to the planned departure date, be on a Request for Approval of Foreign Travel form, and when applicable, include a notification of proposed soviet-bloc travel.

§9-7.403 Clauses to be used when applicable.

This section prescribes modifications to certain clauses in FPR 1-7.403, and provides clauses which shall be used when applicable in addition to the clauses in FPR 1-7.403.

§9-7.403-9 Negotiated overhead rates.

Modify paragraph (c) of FPR 1-3.704-1 to read as set forth in §9-7.203-9.

§9-7.403-50 Patent indemnity.

Insert the clause set forth in §9-9.103-3(b) under the conditions contained in §9-9.103.

§9-7.403-51 Security.

(a) Insert the clause in §9-7.103-53 under the conditions set forth therein.

(b) See Note A of §9-50.704-5.

§9-7.403-52 Organizational Conflicts of Interest.

The appropriate clauses contained in §9-1.54 may be used under the conditions set forth therein.

§9-7.403-53 Safety and health.

Insert the clause set forth in §9-50.704-2 where appropriate.

BEST DOCUMENT AVAILABLE

§9-7.403-54 Preservation of individual occupational radiation exposure records.

Insert the clause set forth in §9-50.704-41 where appropriate.

§9-7.403-55 Subcontracting plan for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

Insert the clause set forth in §9-1.710-3(c) where appropriate.

§ 9-7.403-76 Cost and schedule control systems.

In those instances where the procurement request identifies the requirement as one for which cost and schedule control systems criteria are applicable, insert the clause set forth at § 9-7.203-59.

§9-7.404 Additional clauses.

This section provides DOE clauses for use as needed.

§ 9-7.404-5 Changes.

If a cost plus award fee type contract is involved, correct the references to fixed fee in the clause set forth at FPR 1-7.404-5.

§9-7.404-9 Insurance - liability to third persons.

Insert the clause set forth in FPR 1-7.204-5 under the conditions set forth therein with the clause modification prescribed in §9-7.204-5.

§9-7.404-50 Priorities, allocations, and allotments.

The clause in §9-7.104-50 may be used under the conditions set forth therein.

§9-7.404-51 Permits and licenses.

The clause in §9-7.104-51 may be used under the conditions set forth therein.

§9-7.404-52 Soviet-Bloc controls.

The clause in §9-7.304-52 may be used under the conditions set forth therein.

§9-7.404-53 Nuclear hazards indemnity.

Insert the clauses set forth in §9-50.704-6, §9-50.704-7, and §9-50.704-8 where appropriate.

Subpart 9-7.6 Fixed-Price Construction Contracts

§9-7.600 Scope of subpart.

This subpart supplements FPR 1-7.6.

§9-7.602 Required clauses.

§9-7.602-1 Definitions.

Add the following as paragraph (c):

(c) The term DOE means U. S. Department of Energy.

§9-7.602-16 Patent indemnity.

Insert the clause set forth in §9-9.103-1 under the conditions contained in §9-9.103, in lieu of FPR 1-7.602-16.

§9-7.602-29 Termination for convenience of the Government.

Modify FPR 1-8.703, paragraph (f), as set forth in §9-7.102-19.

§9-7.602-30 Pricing of Adjustments.

Insert the clause prescribed by FPR 1-7.102-20, modified as set forth in §9-7.102-20.

§9-7.602-51 Notice and assistance regarding patent and copyright infringement.

Insert the clause prescribed by §9-9.104 under the conditions set forth therein.

§ 9-7.602-52 (Reserved)

§9-7.602-53 Reporting of royalties.

Insert the clause prescribed by §9-9.110 under the conditions set forth therein.

§9-7.603 Clauses and notices to be used when applicable.

§9-7.603-7 Examination of records by Comptroller General.

Insert the clause prescribed by FPR 1-7.103-3, modified as set forth in §9-7.103-3.

§9-7.603-28 Subcontracts.

Modify FPR 1-7.103-28, paragraph (c)(v), to read as set forth in §9-7.103-28.

§9-7.603-50 Classification.

Insert the clause set forth in §9-7.103-50 under the conditions contained therein.

§9-7.603-51 Notice to the Government of labor disputes.

Insert the clause set forth in FPR 1-7.203-3 under the conditions prescribed therein.

§9-7.603-52 Additional technical data requirements.

Insert the clause set forth in §9-9.202-3(c) under the conditions contained in §9-9.202-3(b).

§9-7.603-53 Security.

Insert the clause in §9-7.103-53 under the conditions contained therein.

§9-7.603-54 Competition in subcontracting.

Insert the clause set forth in FPR 1-7.202-30 in negotiated contracts over $10,000, except in firm fixed-price contracts where award is on the basis of effective price competition or where prices are established by law or regulation.

§9-7.603-55 Rights in technical data - long form.

Insert the clause set forth in §9-9.202-3(e)(2) under the conditions contained in §9-9.202-3(e)(1).

§9-7.603-56 Wage Determination

The following clause shall be added to Standard Form 20:

> Wage determination. The wage rates set forth are the minimum rates which may be paid to the classifications of laborers and mechanics designated therein pursuant to the Davis-Bacon Act (Act of March 3, 1931, as amended; 40 U.S.C. 276a et seq.). DOE does not represent that said minimum rates do now, nor that they will at any time in the future, prevail in the locality of the work for such laborers or mechanics; nor that such mechanics or laborers are or will be obtainable at said rates for work under this contract; nor that said rates represent the most recent wage determination by the Secretary of Labor with respect to such classifications of laborers or mechanics in the locality of the work.

§9-7.603-57 Preservation of individual occupational radiation exposure records.

Insert the clause set forth in §9-50.704-41 where appropriate.

§9-7.603-58 Safety and health.

Insert the clause set forth in §9-50.704-2 where appropriate.

§9-7.603-59 Privacy Act.

Insert the clause prescribed by FPR 1-1.327-5 under the conditions set forth therein.

§9-7.603-60 Subcontracting plan for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

Insert the clause set forth in §9-1.710-3(c) where appropriate.

§9-7.604 Additional clauses.

This section provides DOE clauses for use as needed.

§9-7.604-50 Priorities, allocations, and allotments.

Insert the clause in §9-7.104-50 under the conditions provided therein.

§9-7.604-51 Nuclear hazards indemnity.

Insert the clauses set forth in §9-50.704-6, §9-50.704-7 and §9-50.704-8 where appropriate.

§9-7.604-52 Wage Determination.

The following clause may be added to Standard Form 19 when applicable:

> Wage determination. The wage rates set forth are the minimum rates which may be paid to the classifications of laborers and mechanics designated therein pursuant to the Davis-Bacon Act (Act of March 3, 1931, as amended; 40 U.S.C. 276a et seq.). DOE does not represent that said minimum rates do now, nor that they will at any time in the future prevail in the locality of the work for such laborers or mechanics; nor that such mechanics or laborers are or will be obtainable at said rates for work under this contract; nor that said rates represent the most recent wage determination by the Secretary of Labor with respect to such classifications of laborers or mechanics in the locality of the work.

Subpart 9–7.7 Transportation Contracts

§9–7.700 Scope of subpart.

This subpart supplements FPR 1–7.7.

§9–7.703 Required clauses in transportation contracts.

§9–7.703–1 Definitions.

Insert the clause in FPR 1–7.102–1 as modified by §9–7.102–1.

§9–7.703–7 Examination of records by Comptroller General.

Insert the clause in FPR 1–7.103–3 as modified by §9–7.103–3.

§ 9–7.703–51 (Reserved)

§9–7.703–52 Subcontracting plan for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

Insert the clause set forth in §9–1.710–3(c) where appropriate.

§9–7.704 Additional clauses.

This section provides DOE clauses for use as needed.

§9–7.704–50 Limitation of price and contractor performance (multiyear contracts).

(a) Funds are obligated for performance of this contract in the amount of $ _________. This obligated amount is not considered sufficient for the contract performance required by or described herein for any year other than the first year. Upon availability of additional funds sufficient for performance of the full requirements for the next succeeding year, the Contracting Officer shall, not later than a date agreed to by the parties, so notify the contractor in writing and the amount of funds obligated herein for contract performance shall be increased accordingly. This procedure shall apply for each successive year in which this contract is to be performed.

(b) The Government is not obligated to the contractor for contract performance in any monetary amount in excess of the amount obligated herein.

(c) The contractor shall not incur costs for the performance required for any year after the first year unless and until he has been notified in writing by the Contracting Officer of an increase in the obligated amount in accordance with paragraph (a) of this clause. If so notified, the contractor's performance shall be increased only to the extent required for the additional year for which funds have been obligated.

(d) In the event of termination pursuant to the clause entitled "Termination for Convenience of the Government," the terms "total contract price" and "work under the contract" as used in that clause refer to the amount obligated for performance of this contract as provided in this clause plus the applicable amount, if any, established as the cancellation ceiling, and to the work under the year for which funds have been obligated. In the event of termination for default, the Government's right under this contract shall apply to the entire multiyear requirements.

(e) Notification to the contractor of an increase or decrease in the funds obligated for performance of this contract as a result of a clause other than this clause shall not constitute the notification contemplated by paragraph (a) of this clause.

§9-7.704-51 Cancellation (multiyear contracts).

(a) As used herein, the term "cancellation" means that the Government is canceling, pursuant to this clause, its requirements as set forth in this contract for all years subsequent to that in which notice of cancellation is provided. Such cancellation shall occur only, if by the date or within the time period specified in this contract, or such further time as may be agreed to, the Contracting Officer (1) notifies the contractor that funds will not be available for contract performance for any subsequent year; or (2) fails to notify the contractor that funds have been made available for performance of the requirement for the succeeding year.

(b) Except for cancellation pursuant to this clause or for termination pursuant to the clause entitled "Default", any reduction by the Contracting Officer in the work called for under this contract shall be considered a termination in accordance with the clause entitled "Termination for Convenience of the Government". Cancellation pursuant to this clause shall not be construed a termination in accordance with the clause entitled "Termination for convenience of the Government."

(c) In the event of cancellation pursuant to this clause, the contractor shall not, as consideration therefor, be entitled to any cancellation charge (Note A).

NOTE A: In the event that cancellation charges are appropriate in a particular multiyear award, the following should be substituted for paragraph (c) above:

(c) In the event of cancellation pursuant to this clause, the contractor shall be paid, as consideration therefor, a cancellation charge not to exceed the cancellation ceiling described and separately set forth in this contract as being applicable at the time of cancellation.

(d) The cancellation charge is intended to cover only expenses reasonably necessary for performance which would have been recovered over the multiyear period, but which, because of the cancellation, are therefore not so recovered. The cancellation charge shall be computed and claim therefor made as would be applicable under the clause entitled "Termination for convenience of the Government," except that the cancellation charge shall not include any amount for:

(1) Labor, materials, or other expenses incurred for performance of the canceled work: except that initial costs, preparatory expenses and other nonrecurring costs reasonably and necessarily incurred by the contractor and its subcontractors, but exclusive of any costs allocable to the completed work paid for, may be included in such charge;

(2) Which payment has already been made to the contractor; or

(3) Anticipated profit on the canceled items, or on the costs included in the cancellation charge.

NOTE: This clause may be used where appropriate.

§9-7.704-52 Nuclear hazards indemnity.

Insert the clauses set forth in §9-50.704-6, §9-50.704-7 and §9-50.704-8 where appropriate.

§9-7.704-53 Preservation of individual occupational radiation exposure records.

Insert the clause set forth in §9-50.704-41 where appropriate.

§9-7.704-54 Safety and health.

Insert the clause set forth in §9-50.704-2 where appropriate.

Subpart 9-7.8 Fixed-Price Architect-Engineer Contracts

§9-7.800 Scope of subpart.

This subpart sets forth contract clauses for use in fixed-price architect-engineer contracts.

§9-7.801 Applicability.

The clauses set forth in this subpart shall be used in fixed-price architect-engineer contracts.

§9-7.802 Required clauses.

The clauses set forth in this §9-7.802 shall be inserted, as required, in all fixed-price architect-engineer contracts. See also §9-16.703.

§9-7.802-1 Definitions.

Insert the clause set forth in §9-7.102-1, and add paragraph (e) as follows:

(e) The term "contractor" as used herein means architect-engineer. This term should be substituted in all of the clauses in which "contractor" appears. Additional definitions may be included provided they are not inconsistent with the clause or the provisions of these regulations.

§9-7.802-2 Responsibility of the architect-engineer.

RESPONSIBILITY OF THE ARCHITECT-ENGINEER

(a) The architect-engineer shall be responsible for the professional quality, technical accuracy and the coordination of all designs, drawings, specifications, and other services furnished by the architect-engineer under this contract. The architect-engineer shall, without additional compensation, correct or revise any errors or deficiencies in his designs, drawings, specifications, and other services.

(b) Neither the Government's review, approval or acceptance of, nor payment for, any of the services required under this contract shall be construed to operate as a waiver of any rights under this contract or any cause of action arising out of the performance of this contract, and the architect-engineer shall be and remain liable to the Government in accordance with applicable law for all damages to the Government caused by the architect-engineer's negligent performance of any of the services furnished under this contract.

(c) The rights and remedies of the Government provided for under this contract are in addition to any other rights and remedies provided by law.

§9-7.802-3 Examination of records by Comptroller General.

Insert the clause prescribed by FPR 1-7.103-3, modified as set forth in §9-7.103-3.

§9-7.802-4 Termination.

TERMINATION

(a) The Contracting Officer may, by written notice to the architect-engineer, terminate this contract in whole or in part at any time, either for the Government's convenience or because of the failure of the architect-engineer to fulfill his contract obligations. Upon receipt of such notice, the architect-engineer shall: (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to the Contracting Officer all data, drawings, specifications, reports, estimates, summaries, and such other information and materials as may have been accumulated by the architect-engineer in performing this contract, whether completed or in process.

(b) If the termination is for the convenience of the Government, an equitable adjustment in the contract price shall be made, but no amount shall be allowed for anticipated profit on unperformed services.

(c) If the termination is due to the failure of the architect-engineer to fulfill his contract obligations, the Government may take over the work and prosecute the same to completion by contract or otherwise. In such case, the architect-engineer shall be liable to the Government for any additional cost occasioned to the Government thereby.

(d) If, after notice of termination for failure to fulfill contract obligation, it is determined that the architect-engineer had not so failed, the termination shall be deemed to have been effected for the convenience of the Government. In such event, adjustment in the contract prices shall be made as provided in paragraph (b) of this clause.

(e) The rights and remedies of the Government provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

§9-7.802-5 Disputes.

DISPUTES

(a) This contract is subject to the Contract Disputes Act of 1978, 41 U.S.C. 601, et seq., (Pub. L. 95-563).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved in accordance with this clause.

(c) (1) As used herein, "claim" means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract.

(2) A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim for the purposes of the Act. However, where such submission is subsequently not acted upon in a reasonable time, or disputed either as to liability or amount, it may be converted to a claim pursuant to the Act.

(3) A claim by the Contractor shall be made in writing and submitted to the Contracting Office for his decision. A claim by the Government against the Contractor shall be subject to a decision by the Contracting Officer.

(d) For contractor claims of more than $50,000, the Contractor shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the Contractor's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable. The certification shall be executed by a senior company official in charge at the Contractor's plant or location involved, or by an officer or general partner of the Contractor having overall responsibility for the conduct of the Contractor's affairs.

(e) For contractor claims of $50,000 or less, the Contracting Officer must render a decision within 60 days. For contractor claims in excess of $50,000, the Contracting Officer must decide the claim within 60 days or notify the Contractor of the date when the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) The authority of the Contracting Officer under the Act does not extend to claims or disputes which by statute or regulation, other agencies are expressly authorized to decide.

(h) Interest on the amount found due on a contractor claim shall be paid from the date the claim is received by the Contracting Officer until the date of payment.

(i) Except as the parties may otherwise agree, pending final resolution of a claim by the Contractor arising under the contract, the Contractor shall proceed diligently with the performance of the contract in accordance with the Contracting Officer's decision.

§9-7.802-6 Assignment of claims.

Insert the clause set forth in FPR 1-30.703 under the conditions prescribed therein, and insert "whose functions are now in the Department of Energy" after the words "Energy Research and Development Administration" in paragraph (a).

§9-7.802-7 Changes.

CHANGES

(a) The Contracting Officer may, at any time, by written order, make changes within the general scope of the contract in the services to be performed. If such changes cause an increase or decrease in the architect-engineer's cost of, or time required for, performance of any services under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the architect-engineer for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the architect-engineer of the notification of change unless the Contracting Officer grants a further period of time before the date of final payment under the contract.

(b) No services for which an additional cost or fee will be charged by the architect-engineer will be furnished without the prior authorization of the Contracting Officer.

§9-7.802-8 Covenant against contingent fees.

Insert the clause set forth in FPR 1-1.503 under the conditions contained in FPR 1-1.501.

§9-7.802-9 Clean air and water.

Insert the clause prescribed by FPR 1-1.2302-2 under the conditions set forth therein.

§9-7.802-10 Contract Work Hours and Safety Standards Act - overtime compensation.

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT - OVERTIME COMPENSATION

This contract, to the extent that it is of a character specified in the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), is subject to the following provisions and to all other applicable provisions and exceptions of such Act and the regulations of the Secretary of Labor thereunder.

(a) Overtime requirements. No architect-engineer or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers, mechanics, apprentices, trainees, watchmen, and guards shall require or permit any laborer, mechanic, apprentice, trainee, watchman, or guard in any workweek in which he is employed on such work to work in excess of 8 hours in any calendar day or in excess of 40 hours in such workweek on work subject to the provisions of the Contract Work Hours and Safety Standards Act unless such laborer, mechanic, apprentice, trainee, watchman or guard receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked in excess of 8 hours in any calendar day or in excess of 40 hours in such workweek, whichever is the greater number of overtime hours.

(b) Violation liability for unpaid wages, liquidated damages. In the event of any violation of the provisions of paragraph (a), the architect-engineer and any subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. In addition, such architect-engineer and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer, mechanic, apprentice, trainee, watchman, or guard employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of eight hours or in excess of the standard work week of forty hours without payment of the overtime wages required by paragraph (a).

(c) Withholding for unpaid wages and liquidated damages. The Contracting Officer may withhold from the architect-engineer, from any moneys payable on account of work performed by the architect-engineer or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such architect-engineer or subcontractor for unpaid wages and liquidated damages as provided in the provisions of paragraph (b).

(d) Subcontracts. The architect-engineer shall insert paragraphs (a) through (d) of this clause and the preamble in all subcontracts, and shall require their inclusion in all subcontracts of any tier.

(e) Records. The architect-engineer shall maintain payroll records containing the information specified in 29 CFR 516.2(a). Such records shall be preserved for 3 years from the completion of the contract.

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§9-7.802-11 Convict labor.

Insert the clause set forth in FPR 1-12.204 under the conditions prescribed in FPR 1-12.203.

§9-7.802-12 Equal opportunity.

Insert the clause set forth in FPR 1-16.901-23-A(25) under the conditions contained in FPR 1-12.803.1.

§9-7.802-13 Employment of the handicapped.

Insert the clause set forth in FPR Temporary Regulation 38 under the conditions contained therein.

§9-7.802-14 Payment of interest on architect-engineer claims.

Insert the clause set forth in FPR 1-1.322 under the conditions prescribed therein.

§9-7.802-15 Interest.

Insert the clause set forth in FPR 1-7.203-15 under the conditions prescribed therein.

§9-7.802-16 Patent indemnity.

Insert the clause set forth in §9-9.103-3(b) under the conditions contained in §9-9.103.

§9-7.802-17 Officials not to benefit.

Insert the clause set forth in FPR 1-7.102-17.

§9-7.802-18 Best efforts (Reserved).

§9-7.802-19 (Reserved)

§9-7.802-20 Pricing of adjustments.

Insert the clause prescribed by FPR 1-7.102-20, modified as set forth in §9-7.102-20.

§9-7.802-21 Suspension of work.

SUSPENSION OF WORK

(a) The Contracting Officer may order the architect-engineer, in writing, to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended or delayed by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension or delay, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension or delay to the extent (1) that performance would have been suspended or delayed by any other cause, including fault or negligence of the architect-engineer, or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the architect-engineer shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension or delay, but not later than the date of final payment. No part of any claim based on the provisions of this clause shall be allowed if not supported by adequate evidence showing that the cost would not have been incurred but for a delay within the provisions of this clause.

§9-7.802-22 Notice and assistance regarding patent and copyright infringement.

Insert the clause prescribed by §9-9.104 under the conditions set forth therein.

§9-7.802-23 Listing of employment openings.

Insert the clause entitled "Disabled Veterans and Veterans of The Vietnam Era" as set forth in FPR Temporary Regulation 39 under the conditions described therein.

§9-7.802-24 Reporting of royalties.

Insert the clause set forth in §9-9.110 under the conditions set forth therein.

§9-7.802-25 Buy American Act.

Insert the clause set forth in FPR 1-6.104-5, under the conditions contained therein.

§9-7.802-26 Payment.

PAYMENT

(a) In consideration of the performance of his undertakings under this contract, pursuant to work orders duly issued by the Contracting Officer, the architect-engineer shall be paid the consideration determined in each work order; which consideration shall constitute complete payment for all services furnished in connection with the work required to be performed under this contract and all expenditures which may be made and expenses incurred except as are otherwise expressly provided herein.

(b) The Contractor shall make monthly estimates of the amount and value of the work and services performed by the architect-engineer under this contract, as determined by the Contracting Officer.

(c) Upon approval of such estimate by the Contracting Officer, payment shall be made to the architect-engineer as soon as practicable of 90% of the amount as determined above, less all previous payments.

(d) Upon satisfactory completion by the architect-engineer and acceptance by the Contracting Officer of the work done by the architect-engineer under individual work orders and in accordance with the "Statement of Architect-Engineer Services" of the contract, the architect-engineer will be paid the balance of any money due for the work under said statement and including retained percentages relating to this portion of the work.

(e) Prior to final payment under each work order issued under the contract, or prior to settlement upon termination of the contract, and as a condition precedent thereto, the architect-engineer shall execute and deliver to the Contracting Officer a release of all claims against the Government arising under or by virtue of work orders under this contract, other than such claims, if any, as may be specifically excepted by the architect-engineer from the operations of the release in stated amounts to be set forth therein.

§9-7.802-27 Subcontractors and outside associates and consultants.

SUBCONTRACTORS AND OUTSIDE ASSOCIATES AND CONSULTANTS

Any subcontractors and outside associates or consultants required by the architect-engineer in connection with the services covered by the contract will be limited to such individuals or firms as were specifically identified and agreed to during negotiations. Any substitution in such subcontractors, associates, or consultants will be subject to the prior approval of the Contracting Officer.

§9-7.802-28 Contracting Officer's decisions.

CONTRACTING OFFICER'S DECISIONS

The extent and character of the work to be done by the architect-engineer shall be subject to the general supervision, direction, control, and approval of the Contracting Officer.

§9-7.802-29 Gratuities.

GRATUITIES

(a) The Government may, by written notice to the architect-engineer, terminate the right of the architect-engineer to proceed under this contract if it is found, after notice and hearing by the Head of the Agency or designee, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given architect-engineer, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the performing of such contract, provided that the existence of the facts upon which the head of the agency or designee makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled to pursue the same remedies against the architect-engineer as it could pursue in the event of a breach of the contract by the architect-engineer.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

§9-7.802-30 Composition of architect-engineer.

If the architect-engineer hereunder is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

§9-7.802-50 Order of precedence.

Insert the clause set forth in §9-7.102-50.

§ 9-7.802-51 (Reserved)

§9-7.803 Clauses to be used when applicable.

§9-7.803-1 Patent rights (long form).

Insert the clause set forth in §9-9.107-5(a) under the conditions contained in §9-9.107-4(a).

§9-7.803-2 Authorization and consent.

Insert the clause prescribed by §9-9.102-2 under the conditions set forth therein.

§9-7.803-3 Rights in technical data - long form.

Insert the clause set forth in §9-9.202-2(e)(2) under the conditions contained in §9-9.202-3(e)(1).

§9-7.803-4 Additional technical data requirements.

Insert the clause set forth in §9-9.202-3(c) under the conditions contained in § 9-9.202-3(b).

§9-7.803-5 (Reserved)

§9-7.803-6 (Reserved)

§9-7.803-7 Price reduction for defective cost or pricing data.

Insert the appropriate clause set forth in FPR 1-3.814-1 under the conditions described therein.

§9-7.803-8 Audit and records.

Insert the appropriate clause or clauses set forth in FPR 1-3.814-2 under the conditions described therein.

§9-7.803-9 Subcontractor cost or pricing data.

Insert the clause set forth in DOE-PR §9-50.704-24.

§9-7.803-10 Cost accounting standards.

(a) Insert the solicitation notices set forth in FPR 1-3.1203.

(b) Insert the applicable clauses set forth in FPR 1-3.1204.

§9-7.803-11 Privacy Act.

Insert the clause prescribed by FPR 1-1.327-5 under the conditions set forth therein.

§9-7.803-12 Alterations in contract.

Insert the clause set forth in FPR 1-7.204-1.

§9-7.803-46 Insurance.

Insert the clause set forth in FPR 1-7.303-46 under the conditions described therein.

§9-7.803-50 Classification.

Insert the clause in §9-7.103-50 under the conditions contained therein.

§9-7.803-53 Security.

Insert the clause in §9-7.103-53 under the conditions contained therein.

§9-7.803-54 Preservation of individual occupational radiation exposure records.

Insert the clause set forth in §9-50.704-41 where appropriate.

§9-7.803-55 Safety and health.

Insert the clause set forth in §9-50.704-2 where appropriate.

§9-7.803-56 Subcontracting plan for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

Insert the clause set forth in §9-1.710-3(c) where appropriate.

§9-7.804 Additional clauses.

§9-7.804-2 Nuclear hazards indemnity.

Insert the clauses set forth in §9-50.704-6, §9-50.704-7 and §9-50.704-8 where appropriate.

§9-7.804-3 Administrative terms.

The following additional terms shall be included in Standard Form 252, Item 6:

(a) Description of project.

NOTE: As full a description as is feasible should be inserted. If the architect-engineer services are to be furnished for a construction project, describe the facilities involved, including any auxiliary facilities that may be required.

(b) Statement of architect-engineer services. The contractor shall, within the time specified in the contract, or if not specified therein, in the shortest reasonable time, furnish for the construction project the architect-engineer services described below, subject to such further detailed requirements as may be appended to this contract by agreement of the parties.

NOTE A: This form of contract provides for completion of the architect-engineer services "within the shortest reasonable time." The form may be modified to provide for completion of separable parts of the work at different times.

NOTE B: When title I, II, or III services are to be furnished, the following language may be used to describe such services. Modifications in the text of the language may be made to omit inappropriate items or, where necessary, to meet particular circumstances.

Title I - Preliminary Services

(1) Conduct or arrange for, by subcontract or otherwise as approved by the Contracting Officer, and supervise all necessary topographical and other field surveys, the preparation of maps, and necessary test borings and other surface investigations.

(2) Consult and collaborate with DOE to determine the requirements which will govern the design of the project and to establish architectural and engineering criteria for such design.

(3) Conduct preliminary studies, and prepare preliminary sketches, drawings, layout plans, outline specifications, and reports showing features and characteristics of the design proposed to meet DOE's requirements. If more than three studies, including sketches, drawings, plans, outline specifications, or documents are required because of changes initiated by DOE, an equitable adjustment in the lump-sum compensation will be made in accordance with provisions of the Changes article.

(4) The drawings, plans, and outline specifications and documents shall be prepared in such form and furnished in such quantity as directed by DOE.

NOTE: Specific quantities of the drawings, plans, outline specifications, and documents should be indicated here or elsewhere in the contract.

(5) Prepare preliminary estimates of cost and time schedules for (i) completion of the design, working drawings, and specifications, and (ii) construction.

(6) Prepare preliminary estimates of material quantities required for construction.

Title II - Design Services

(1) Upon approval by DOE of preliminary plans and estimates, undertake the design of the construction project.

(2) Undertake restudy and redesign work due to minor deviations from the approved preliminary work as may be required by DOE.

(3) Prepare and revise, for the approval of DOE, and furnish complete sets of contract bidding documents, including working drawings, details, and specifications for construction, in such form and quantity and including such provisions as may be required by law or the directions of DOE.

NOTE: Specific quantities of drawings and specifications should be indicated here or elsewhere in the contract.

(4) Prepare, or when directed by DOE, participate with others in the preparation of a detailed estimate of the cost of a construction based on the approved design and working drawings and specifications.

(5) Assist DOE in securing, analyzing, and evaluating construction bids or proposals.

(6) When requested, consult with and advise DOE on any questions which may arise in connection with the architect-engineer services described in this contract.

Title III - Supervision of Construction

(1) Furnish and maintain governing lines and benchmarks to provide horizontal and vertical controls to which construction progress may be referred.

(2) Check and approve or require revision of, all vendors' shop drawings to assure conformity with the approved design and working drawings and specifications.

(3) Inspect the execution of construction so as to assure adherence to approved working drawings and specifications.

(4) Inspect construction workmanship and materials, and equipment, and report to DOE as to their conformity or nonconformity to the approved working drawings and specifications.

(5) Make or procure such field or laboratory tests of construction workmanship, materials, and equipment, as DOE may require or approve.

(6) Prepare estimates of reasonable amounts of increase or decrease in contract price and/or contract completion time for contract modifications, evaluate proposals submitted by the constructor for such contract adjustments and make recommendations to the Contracting Officer for use in negotiating.

(7) Prepare reports and make recommendations on status of deliveries or materials and equipment as DOE may require or approve.

(8) Prepare monthly and other reports of the progress of construction, as may be required, and partial, interim, and final estimates and reports of quantities and values of construction work performed, for payment or other purposes.

(9) Furnish _________ set(s) of reproducible "as-built" record drawings of the type specified by DOE and _________ set(s) of marked-up specifications, showing construction as actually accomplished.

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§9-7.804-50 Priorities, allocations, and allotments.

Insert the clause in §9-7.104-50 under the conditions provided therein.

§9-7.804-51 Privacy Act.

Insert the clause prescribed by FPR 1-1.327-5 under the conditions set forth therein.

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PART 9-8 TERMINATION OF CONTRACTS

§9-8.000 Scope and applicability of part.

(a) This part implements and supplements the policies, procedures, and other requirements of FPR Part 1-8.

(b) The provisions of FPR Part 1-8 and this part may be utilized when authorized by Heads of Procuring Activities in accordance with FPR 1-8.000(d) in the situations enumerated in FPR 1-8.000(d) (1) and (2).

(c) The policies and requirements of FPR 1-8 and this part shall be applied to the termination and settlement of subcontracts by contractors having cost-reimbursement type contracts.

Subpart 9-8.2 General Principles Applicable to the Termination for Convenience and Settlement of Fixed-Price Type and Cost-Reimbursement Type Contracts

§9-8.201 General.

(a) Subject to the requirements of paragraph (b) of this section, the Contracting Officer may terminate a contract for the convenience of the Government and enter into a settlement agreement in accordance with FPR 1-8.2. Claims arising out of a partial termination of a contract should be processed and settled in the same manner as claims arising out of a complete termination.

(b) The Head of the Agency or his designee shall be notified prior to taking any action to terminate (1) contracts for the operation of Government-owned facilities, (2) any prime contract or subcontract in excess of $10 million, and (3) any contract the termination of which is likely to provoke unusual interest.

§9-8.206 Fraud or other criminal conduct.

Any evidence of fraud or other criminal conduct in connection with the settlement of a terminated contract shall be reported in accordance with §9-1.606-50.

§9-8.208-4 Authorization for subcontract settlements without approval or ratification.

The power to authorize a contractor to conclude settlements of his terminated subcontracts without approval or ratification of the Contracting Officer when the amount of settlement is more than $10,000, but not more than $25,000, shall be exercised by Contracting Officers, only with the approval of the Heads of Procuring Activities.

§9-8.208-8 Assignment of rights under subcontracts.

The Contracting Officer's determination under FPR 1-8.208-8(b) that it is in the best interest of the Government to settle and pay directly a subcontractor's termination claim is subject to the approval of the Head of the Procuring Activity.

§9-8.211 Review and approval of proposed settlements.

§9-8.211-1 Settlement review boards.

FPR 1-8.211-2(b) will not apply to proposed settlements under DOE contracts. The review of all proposed settlements under circumstances specified in FPR 1-8.211-2(a) will be by field office settlement review boards established by Heads of Procuring Activities.

§9-8.211-2 Required review and approval.

(a) Proposed settlement agreements or determinations in excess of contractual authority of Heads of Procuring Activities will be transmitted to the Senior Procurement Official, Headquarters, for review and approval.

(b) Contracting Officers shall not conclude proposed settlements or determinations until the approvals required by FPR 1-8.211 and this section have been obtained.

§9-8.212 Payment.

§9-8.212-1 Partial payments upon termination.

Protection of the Government's interest in partial payments, by means other than those specified in FPR 1-8.212-1(d), shall be subject to approval of a Head of a Procuring Activity.

Subpart 9-8.3 Additional Principles Applicable to the Settlement of Fixed-Price Type Contracts Terminated for Convenience

§9-8.307 Settlement proposals.

§9-8.307-1 Submission of settlement proposals.

Contracting Officers shall encourage contractors to use the suggested formats set forth in FPR 1-8.802, 1-8.803, and 1-8.804 in the submission of settlement proposals, inventory schedules, accounting information, and applications for partial payments. The form entitled "Schedule of Accounting Information" (FPR 1-8.804-1) need be filed only once with respect to any termination. When the standard forms are not appropriate for a particular contract, Heads of Procuring Activities may authorize modifications thereof. However, the certificate shall be substantially as set forth in the form.

§9-8.307-2 Basis for settlement proposals.

Termination claims shall not be submitted on any basis other than the inventory or total cost basis without the prior approval of the Heads of Procuring Activities.

Subpart 9-8.4 Additional Principles Applicable to the Settlement of Cost-Reimbursement Type Contracts Terminated for Convenience

§9-8.404 Procedure after invoices or vouchers are discontinued.

§9-8.404-1 Submission of settlement proposal.

Contracting Officers should encourage contractors to submit settlement proposals in the form set forth in FPR 1-8.802-4. When necessary, Heads of Procuring Activities may authorize modification of this form. However, the certificate shall be substantially as set forth in the form.

Subpart 9-8.5 Disposition of Termination Inventory

§9-8.501-2 General restriction on contractor's authority.

HPA's may authorize contractors to sell termination inventory to DOE and other employees of the Federal Government and employees of DOE contractors on the same basis afforded the general public, provided the employees warrant in writing that they have not:

(a) Participated in the determination to dispose of the property;

(b) Participated in preparation of the property for sale;

(c) Participated in determining the method of sale; or

(d) Acquired information not otherwise available to the general public regarding usage, conditions, quality, or value of the property. The required warranty signed by the employee concerned shall be obtained prior to completing the action.

§9-8.503 Inventory schedules.

§9-8.503-1 Submission of inventory schedules.

Contracting Officers should encourage contractors to submit inventory schedules in the forms set forth in FPR 1-8.803. When necessary, Heads of Procuring Activities may authorize modification of these forms. However, the certificate shall be substantially as set forth in the forms.

§9-8.504 Scrap and salvage.

§9-8.504-1 General.

Scrap determinations shall be reviewed in accordance with §9-8.512. For instructions regarding segregation and disposal of scrap metal, see DOE-Property Management Regulation 109-45 (PMR 109-45).

§9-8.504-2 Scrap warranty.

Release from liability under scrap warranties shall be reviewed in accordance with §9-8.512(b).

§9-8.505 Screening of property.

(a) When the Contracting Officer determines that application of DOE circulating requirements would result in an appreciable increase in disposal costs involving retention of personnel after the contract has been terminated, rental of storage space, or other factors, arrangements should be made locally with GSA to screen inventory schedules on an accelerated basis.

(b) Priority in the acquisition of serviceable or usable property included in the contractor's inventory shall be as follows:

(1) The DOE office administering the contract,

(2) Other activities of the DOE,

(3) Other agencies of the Government.

(c) The DOE circulation requirements set forth in DOE-PMR 109-43 are applicable to personal property in the contractor's inventory schedules.

§9-8.507 Sale or other disposition of termination inventory.

§9-8.507-1 General.

(a) All sales shall be in accordance with instructions set forth in DOE-PMR 109-45.

(b) Any property which is included in the contractor's inventory schedules, which has not been acquired by the Government under §9-8.505 or donated under §9-8.508, may be acquired by the contractor or sold by the contractor to a third party, at any time after notification by the Contracting Officer that screening has been accomplished or will not be required. Generally, any such acquisition by the contractor or sale to a third party shall be on a competitive basis. Any acquisition or sale shall be in accordance with applicable laws and regulations. Any such acquisition or sale shall be subject to the approval of the Contracting Officer, as part of or prior to the final settlement.

§9-8.507-5 Applicability of antitrust laws.

Heads of Procuring Activities and Headquarters officials having the contracting responsibility shall furnish two copies of the notification referred to in FPR 1-8.507-5 to the Office of the General Counsel and one copy to the Senior Procurement Official, Headquarters.

§9-8.507-6 Foreign contractor inventory.

Contractor inventory located in foreign countries shall be handled in accordance with DOE-PMR 109-43.5, 109-44.3 and 109-45.51.

§9-8.507-50 Sales without competition.

(a) See DOE-PMR 109-45.

(b) Sales or acquisitions by the contractor without competitive bids may be authorized by the Contracting Officer only in exceptional or unusual cases. Subject to the terms of the contract, such sales or acquisitions without competitive bids may be negotiated at prices that are fair and reasonable and not less than the proceeds that could reasonably be expected to be obtained if the property were offered for competitive sale at that time.

(c) Any sales made under paragraph (b) of this section shall be reviewed to the extent required by §9-8.512.

§9-8.507-51 Extension of credit.

Contractors shall not be required to extend credit to purchasers, and any sales made by contractors on credit shall be at their own risk.

§9-8.508 Donations.

It is DOE policy to utilize the established donation procedure in disposal of termination inventory. For detailed procedures, see DOE-PMR 109-44.

§9-8.509 Destruction or abandonment.

For detailed procedures, see DOE-PMR 109-45.

§9-8.512 Review of property disposal.

The following property disposal actions shall be reviewed by DOE employees designated to act as property disposal reviewing authorities:

(a) Determinations that termination inventory is scrap or salvage (the nature of the review of such determinations shall depend upon the acquisition cost and location of the property involved and such other considerations as the Contracting Officer determines to be pertinent);

(b) Release from liability under a scrap warranty, if the original acquisition cost of the material is $10,000 or more;

(c) Sales;

(d) Proposals to destroy, abandon, or donate to a public body; and

(e) Such other actions as the Contracting Officer deems appropriate.

Subpart 9-8.6 Termination for Default

§9-8.601 General.

See also §9-8.201(b) and FPR 1-8.601.

Subpart 9-8.7 Clauses

§9-8.700 Scope and applicability of subpart.

§9-8.700-2 Applicability.

The standard clauses set forth in FPR 1-8.701 through 1-8.710 are applicable as prescribed in FPR 1-8.700-2, subject to the following:

(a) Architect-engineer contracts should also contain an appropriate termination clause approved by Counsel. Reference §9-7.802-4 and §9-8.751.

(b) Cost principles referenced in the various termination articles shall be in accordance with Part 9-15.

§9-8.750 (Reserved).

§9-8.751 Termination article for cost-plus-a-fixed-fee architect-engineer contracts.

The following article is suggested for use in cost-plus-a-fixed-fee contracts:

> Termination—(a) Notice of termination for default or convenience. The Contracting Officer may at any time terminate performance of the work under this contract in whole or from time to time in part for the default of the architect-engineer or for the convenience of the Government by written notice to the architect-engineer stating the ground for termination. Such termination shall be effective in the manner and upon the date specified in said notice and shall be without prejudice to any claims which the Government may have against the architect-engineer. Upon receipt of such notice and except as otherwise directed by the Contracting Officer, the architect-engineer shall:
>
> (1) Stop work under the contract on the date and to the extent specified in the notice of termination;
>
> (2) Place no further orders or subcontracts for materials, services, or facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated; and
>
> (3) Terminate all orders and subcontracts to the extent they relate to the performance of work terminated by the notice of termination.
>
> (b) Termination for default.
>
> (1) If the architect-engineer refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof; or fails to complete said work within such time; or if the architect-engineer fails to perform any of the other provisions of this contract, and does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Contracting Officer may terminate for default the architect-engineer's right to proceed with the work as to which there has been delay, provided that the performance of the work shall not be terminated for default because of any delays in the completion of work due to unforeseeable causes beyond the control and without the fault or negligence of the architect-engineer, including, but not restricted to, acts of God, or the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another architect-engineer in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the architect-engineer and subarchitect-engineers or suppliers; and if the architect-engineer within ten (10) days from the beginning of any such delay (unless the Contracting Officer grants a further period of time prior to the date of final settlement of the contract) notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact thereon shall

be final and conclusive on the parties hereto, subject only to appeal by the architect-engineer to the head of the agency or his designee in accordance with Article ___________ hereof entitled "Disputes."

(2) If, after notice of termination of this contract for default under (1) above, it is determined for any reason that the architect-engineer was not in default pursuant to (1), or that the architect-engineer failure to perform or to make progress in performance is due to causes beyond the control and without the fault or negligence of the architect-engineer pursuant to the provisions of this clause relating to excusable delays, the notice of termination shall be deemed to have been issued for the convenience of the Government under this clause, and the rights and obligations of the parties hereto shall in such event be governed accordingly.

(c) Liability for costs on default. If performance of the work under this contract is terminated for the default of the architect-engineer, the Government may complete or employ any other person or persons to complete the work, and the architect-engineer shall be liable to the Government for increased costs occasioned the Government by the default.

(d) Terms of settlement. Upon the termination of performance of work under this contract, full and complete settlement of all claims of the architect-engineer with respect to the terminated work shall be made as follows:

(1) Assumption of contractor's obligations. The Government shall have the right in its discretion to assume all obligations, commitments, and claims that the architect-engineer may have theretofore in good faith undertaken or incurred in connection with the terminated work, the cost of which would be allowable in accordance with the provisions of this contract; and the architect-engineer shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government all the rights and benefits of the architect-engineer, related to such obligations, commitments, and claims.

(2) Payment for allowable costs. The Government shall treat as allowable costs all expenditures made in accordance with "Article _______________" hereof entitled "Allowable costs and fixed fee," not previously so allowed or otherwise credited.

(3) Payment for termination expense. If performance of work under the contract is terminated for the convenience of the Government, the Government shall reimburse the architect-engineer for such further expenditures made after the date of termination for the protection of Government property and for such legal and accounting services in connection with settlement as are required or approved by the Contracting Officer.

(4) Payments on account of fixed fee. If performance of work under the contract is terminated for the convenience of the Government, the architect-engineer shall be paid that portion of the fixed fee which the work actually completed, so determined by the Contracting Officer, bears to the entire work under this contract less payments previously made on account of the fee. If performance of the work under the contract is terminated for the default of the architect-engineer, no further payment beyond that amount due on completed work with appropriate fee payment, shall accrue on account of the fixed price.

(5) Computation of amount due. In arriving at the amount, if any, due the architect-engineer under this article, there shall be deducted from what would otherwise be due (i) all unliquidated advances and all other unliquidated payments on account theretofore made to the contractor, (ii) any claims of the Government against the contractor in connection with this contract, and (iii) all deductions due under the terms of this contract and not otherwise recovered by or credited to the Government.

(6) Disposition of advances. Upon termination of the work under this contract, any advance under this contract shall be handled as required by Article _______, "Payments and Advances."

(7) Property accounting and release. The architect-engineer shall furnish the accounting for Government-owned property required by the clause entitled "Property" and the assignment, closing financial statement, and release required by the clause entitled "Payments and Advances."

(e) Rights and remedies of the Government. The rights and remedies of the Government provided in this article are in addition to any other rights and remedies provided by law or under this contract.

NOTE: Paragraph (d)(7) as set forth above should be used in contracts where funds are advanced by the DOE. For contracts where funds are not advanced, delete the requirements for a closing financial statement, change the article reference from "Payments and Advances" to "Payments," and omit paragraph (d)(6) as set forth above.

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PART 9-9 PATENTS, DATA, AND COPYRIGHTS

§9-9.000 Scope of part.

(a) This part sets forth policies, instructions, and contract clauses pertaining to patents, data, and copyrights in connection with the procurement of supplies and services.

(b) It is noted that §9-9.107-4(d) entitled "License rights (upon request) to the contractor" pertains to contracts for the operation of Government-owned facilities or special long term, cost-reimbursement Government-funded research, development, or demonstration work. It provides that in such contracts, the paragraph set forth in §9-9.107-5(e) shall be substituted for paragraph (c)(1) of the Patent Rights (long form) clause of §9-9.107-5(a) to provide a revocable, nonexclusive, royalty-free license in inventions only upon request by the contractor for reservation of such license.

(c) Also, §9-9.107-4(g) entitled "Facilities license" covers a contract which has, as a purpose, the design, construction, or operation of a Government-owned research, development, demonstration, or production facility. It states that the paragraph of §9-9.107-5(h) shall be used in all such contracts, in addition to the provisions of the Patent Rights (long form) clause, since it is necessary that the Government be accorded certain rights with respect to further use of the facility by or on behalf of the Government upon termination of the contract, including the right to make, use, transfer, or otherwise dispose of all articles, materials, products, or processes embodying inventions or discoveries used or embodied in the facility, regardless of whether or not conceived or actually reduced to practice under or in the course of such contracts. Further, §9-9.107-4(h) entitled "Subcontracts" states that the withholding of payment provision of the prime contract will not normally be included in a subcontract except upon request of the Contracting Officer except for subcontracts awarded by contractors who operate Government-owned facilities and for other special contracting situations, in which cases the withholding of payment provision may be flowed down to the first-tier subcontractor only.

(d) With respect to technical data and copyrights, §9-9.202-4 applies to contracts for the operation of Government-owned, contractor-operated research or production facilities. This section sets forth the Rights in Technical Data-Facility clause which shall normally be included in such contracts.

Subpart 9-9.1 Patents

§9-9.100 Scope of subpart.

(a) This subpart sets forth policies, procedures, and contract clauses with respect to inventions made, conceived, or utilized in the course of or under any contracts, grants, agreements, understandings or other arrangements entered into with or for the benefit of the DOE. One of DOE's primary missions requires the use of its procurement process to insure the conduct of research, development, and demonstration leading to the ultimate commercial utilization of all efficient sources of energy. Accordingly, DOE's mission is not oriented toward procurement for Government use, except where procurements are involved with special classified programs or the construction or improvement of Government-owned facilities. To accomplish its mission, DOE must work in cooperation with industry in the development of new energy sources and in achieving the ultimate goal of widespread commercial use. To this end, Congress has provided DOE with an array of incentives to secure the adoption of the new technology developed for DOE. An important incentive in commercializing technology is that provided by the patent system. As set forth in these regulations, patent incentives, including DOE's authority to waive the Government's patent rights to the extent provided for by statute, will be utilized in appropriate situations at the time of contracting to encourage industrial participation, foster commercial utilization and competition, and make the benefits of DOE's activities widely available to the public. In addition to considering the waiver of patent rights at the time of contracting, DOE will also consider the incentive of a waiver of patent rights upon the reporting of an identified invention when requested by the contractor or the employee-inventor with the permission of the contractor. These requests can be made whether or not a waiver request was made at the time of contracting. Waivers for identified inventions will be provided where it is determined that the patent waiver will be a real incentive to achieving the development and ultimate commercial utilization of inventions. Where a waiver of the Government's patent rights is granted, either at the time of contracting or upon request or after an invention is made, certain safeguards will be required by DOE to protect the public interest.

(b) Another major DOE mission is to manage the nation's uranium enrichment and other classified programs, where R&D procurements are directed toward processes and equipment not available to the public. To accomplish DOE's programs for bringing private industry into these and other special programs to the maximum extent permitted by national security and policy considerations, it is desirable that the technology developed in these programs be made available on a selected basis for use in the particular fields of interest and under controlled conditions by properly cleared industrial and scientific research institutions. To insure such availability and control, the grant of waivers in these programs may necessarily be more limited than in other DOE programs.

§9-9.101 (Reserved).

§9-9.102 Authorization and consent.

(a) Under 28 USC 1498, any suit for unauthorized use of a United States patent based on the manufacture or use by or for the United States of an invention described in and covered by a patent of the United States by a contractor or by a subcontractor (at any tier) can be maintained only against the Government in the Court of Claims, and not against the contractor or subcontractor, in those cases where the Government has authorized or consented to the manufacture or use of the patented invention. Accordingly, to insure that work by a contractor or subcontractor under a Government contract may not be enjoined by reason of patent infringement, authorization and consent shall be given in the prime contract and shall apply to all subcontracts thereunder as provided below. The liability of the Government for damages in such suit against it may, however, ultimately be borne by a contractor or subcontractor in accordance with the terms of any Patent Indemnity clause also included in the contract or subcontract, and an Authorization and Consent clause may be included in the same contract or subcontract.

(b) In certain contracting situations, such as those involving demonstration projects, consideration should be given to the impact of third party-owned patents covering technology that may be incorporated in the project which may ultimately affect widespread commercial use of the project results. In such situations, Patent Counsel should be consulted to determine what modifications, if any, should be made to the utilization of the Authorization and Consent and Patent Indemnity provisions or what other action might be deemed appropriate.

(c) An Authorization and Consent clause shall not be used in contracts where both complete performance and delivery are to be outside the United States, its possessions or Puerto Rico.

§9-9.102-1 Authorization and consent in contracts for supplies or services.

The following contract clause shall be included in all contracts for supplies or services except when prohibited by §9-9.102(c) or in contracts for research, development, or demonstration work and in subcontracts thereunder in which the clause in §9-9.102-2 is required.

AUTHORIZATION AND CONSENT

The Government hereby gives its authorization and consent (without prejudice to any rights of indemnification) for all use and manufacture, in the performance of this contract or any part hereof or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract), of any invention described in and covered by a patent of the United States (a) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract or (b) utilized in the machinery, tools or methods, the use of which necessarily results from compliance by the contractor or the using subcontractor with (i) specifications or written provisions now or hereafter forming a part of this contract, or (ii) specific written instructions given by the Contracting Officer directing the manner of performance. The entire liability to the Government for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clauses, if any, included in this contract or any subcontract hereunder (including all lower-tier subcontracts), and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

§9-9.102-2 Authorization and consent in contracts for research, development, or demonstration.

Greater latitude in the use of patented inventions may be necessary in a contract for research, development, or demonstration work than in a contract for supplies. Unless prohibited by §9-9.102(c), the following clause shall be included in all contracts calling for research, development, or demonstration work and shall be included in contracts calling for both supplies and research, development, or demonstration work where the latter work is a primary purpose of the contract. In all other contracts for both supplies and research, development, or demonstration work, the Authorization and Consent clause in §9-9.102-1 shall be used. If the following clause is included in a contract, the clause in §9-9.102-1 shall not be included.

AUTHORIZATION AND CONSENT

The Government hereby gives its authorization and consent for all use and manufacture of any invention described in and covered by a patent of the United States in the performance of this contract or any part hereof or any amendment hereto or any subcontract hereunder (including all lower-tier subcontracts).

§9-9.103 Patent indemnification of Government by contractors.

In order that the Government may be reimbursed for liability for patent infringement arising out of or resulting from the performance of construction contracts or contracts for supplies, including standard parts and components which normally are or have been sold or offered for sale to the public in the commercial open market, or which are the same as such supplies with a relatively minor modification thereof, a clause providing for indemnification of the Government shall be included in such contracts as well as in subcontracts, as appropriate, in accordance with the instructions set forth below. However, a Patent Indemnity clause normally shall not be used in contracts or subcontracts:

(a) When the Authorization and Consent clause in §9-9.102-2 applicable to research, development, or demonstration contracts is authorized, except that in contracts calling also for supplies of the kind described above, or for supplying standard parts or components, the Patent Indemnity clause in §9-9.103-3(b) may be used with respect to such supplies; in subcontracts thereunder, the Patent Indemnity clause of §9-9.103-1 or §9-9.103-3(b) shall be used as appropriate;

(b) When the contract is for supplies which clearly are not, or have not been, sold or offered for sale to the public in the commercial open market;

(c) When both performance and delivery are to be outside the United States, its possessions, or Puerto Rico, unless the contract indicates that the supplies are ultimately to be shipped into the United States, its possessions or Puerto Rico, in which case the instructions of §9-9.103-1 or §9-9.103-3 are applicable; or

(d) When the contract is for an amount of $10,000 or less (as a matter of administrative convenience, however, the clause need not be deleted where it is a part of a standard form being used for such contracts, since it is self-deleting).

§9-9.103-1 Patent indemnification in formally advertised contracts - commercial status predetermined.

Except as prohibited by §9-9.103, the following clause is appropriate in formally advertised construction contracts and shall be included in formally advertised contracts for supplies when it has been determined in advance of issuing the invitation for bids that the supplies (or such supplies apart from relatively minor modifications to be made thereto) normally are or have been sold or offered for sale by any supplier to the public in the commercial open market.

PATENT INDEMNITY

> If the amount of this contract is in excess of $10,000 the contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States letters patent (except U.S. letters patent issued upon an application which is now or may hereafter be kept secret or otherwise withheld from issue by order of the Government) arising out of the manufacture or delivery of supplies or out of construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this contract, or out of the use or disposal by or for the account of the Government of such supplies or construction work. The foregoing indemnity shall not apply unless the contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in the defense thereof; and further, such indemnity shall not apply to: (a) an infringement resulting from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the contractor; (b) an infringement resulting from addition to or change in, such supplies or components furnished or construction work performed which addition or change was made subsequent to delivery or performance by the contractor; or (c) a claimed infringement which is settled without the consent of the contractor, unless required by final decree of a court of competent jurisdiction.

§9-9.103-2 (Reserved)

§9-9.103-3 Patent indemnification in negotiated contracts.

The fact that a contract is negotiated does not preclude inclusion of a Patent Indemnity clause in such a contract, and such clause may be included in negotiated construction contracts and in contracts for supplies when such supplies normally are or have been sold or offered for sale to the public in the commercial open market, or are such supplies with relatively minor modifications made thereto, or in contracts for supplying standard parts or components.

(a) Subject to the foregoing and to the prohibitions in §9-9.103, the clause in §9-9.103-1 is approved for use in negotiated contracts for construction work or supplies.

(b) Except as prohibited by § 9-9.103, the following clause is appropriate in research, development, or demonstration contracts when it has been determined by DOE in any particular contracting situation that the contract will require standard supplies sold or offered for sale to the public on the commercial open market or will use the contractor's practices or methods which normally are or have been used in providing goods and services on the commercial open market or will use any parts, components, practices, or methods to the extent to which the Contractor has secured indemnification from liability.

PATENT INDEMNITY

The contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs, for infringement of U.S. Letters Patent (except U.S. Letters Patent issued upon an application which is now or may hereafter be kept secret or otherwise withheld from issue by order of the Government) resulting from the contractor's: (a) furnishing or supplying standard parts or components which have been sold or offered for sale to the public on the commercial open market; or (b) utilizing its normal practices or methods which normally are or have been used in providing goods and services in the commercial open market, in the performance of the contract; or (c) utilizing any parts, components, practices, or methods to the extent to which the contractor has secured indemnification from liability. The foregoing indemnity shall not apply unless the contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in the defense thereof; and further, such indemnity shall not apply to a claimed infringement which is settled without the consent of the contractor, unless required by final decree of a court of competent jurisdiction or to an infringement resulting from addition to or change in such supplies or components furnished or construction work performed for which addition or change was made subsequent to delivery or performance by the contractor.

§9-9.103-4 Waiver of indemnity by the Government.

If it is desired to exempt one or more specified United States patents from the Patent Indemnity clause in §9-9.103-1 and §9-9.103-3(b), concurrence for such exemption shall be obtained from the Patent Counsel assisting the procuring activity, and the following clause shall be included in the contract, in addition to the Patent Indemnity clause.

WAIVER OF INDEMNITY

Any provision of this contract to the contrary notwithstanding, the Government hereby authorizes and consents to the use and manufacture, solely in the performance of this contract, of any invention covered by the United States patents identified as listed below, and waives indemnification by the contractor with respect to such patents (identify the patents by number or by other means if more appropriate).

§9-9.104 Notice and assistance.

The Government should be notified by the contractor of all claims of infringement in connection with the performance of a Government contract which come to the contractor's attention. The contractor should also assist the Government, to the extent of evidence and information in the possession of the contractor, in connection with any suit against the Government or any claims against the Government made before suit has been instituted, on account of any alleged patent or copyright infringement arising out of or resulting from the performance of the contract. Accordingly, the following clause shall be included in all contracts in excess of $10,000 for supplies, services, construction, research, development, or demonstration work. However, the clause shall not be included in contracts:

(a) Where both performance and delivery are to be outside the United States, its possessions, or Puerto Rico, unless the contract indicates that the supplies are ultimately to be shipped into the United States, its possessions, or Puerto Rico; or

(b) Of $10,000 or less (as a matter of administrative convenience, however, the clause need not be deleted when it is part of a standard form being used for such contracts since it is self-deleting).

NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

> The provisions of this clause shall be applicable only if the amount of this contract exceeds $10,000.
>
> (a) The contactor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this contract of which the contractor has knowledge.
>
> (b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed hereunder, the contractor shall furnish to the Government when requested by the Contracting Officer, all evidence and information in possession of the contractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except where the contractor has agreed to indemnify the Government.
>
> (c) This clause shall be included in all subcontracts.

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§9-9.105 (Reserved).

§9-9.106 Classified inventions.

Unauthorized disclosure of classified subject matter, whether in a patent application or resulting from the issuance of a patent, may be a violation of not only the Atomic Energy Act of 1954, as amended, and other laws relating to espionage and national security, but also provisions pertaining to disclosure of information incorporated in the contract. Accordingly, the following clause shall be included in every contract which covers or is likely to cover classified subject matter.

CLASSIFIED INVENTIONS

> (a) The contractor shall not file or cause to be filed on any invention or discovery conceived or first actually reduced to practice in the course of or under this contract in any country other than the United States, an application or registration for a patent without first obtaining written approval of the Contracting Officer.
>
> (b) When filing a patent application in the United States on any invention or discovery conceived of or first actually reduced to practice in the course of or under this contract, the subject matter of which is classified for reasons of security, the contractor shall observe all applicable security regulations covering the transmission of classified subject matter. When transmitting the patent application to the United States Patent and Trademark Office, the contractor shall by separate letter identify by agency and number, the contract or contracts which require security classification markings to be placed on the application.
>
> (c) The substance of this clause shall be included in subcontracts which cover or are likely to cover classified subject matter.

§9-9.107 Patent rights under contracts for research, development, and demonstration and under special contracts.

§9-9.107-1 General.

This section sets forth the policies, procedures and practices of DOE in connection with inventions, patents, and related matters based upon the Atomic Energy Act of 1954, as amended (42 USC 2182), and Section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 USC 5908); and, to the extent not inconsistent with the foregoing statutes, the revised Presidential Memorandum and Statement of Government Patent Policy, August 23, 1971 (36 F.R. 16887-16892). Section 152 of the Atomic Energy Act provides that the title to inventions useful in the nuclear energy field, made or conceived in the course of or under a contract, subcontract, or arrangement entered into for the benefit of the Commission (now DOE), shall be vested in the Government. Government rights in such an invention may be waived consistent with the policy of Section 152. In a similar manner, Section 9 of the Federal Nonnuclear Energy Research and Development Act provides that title to inventions made or conceived in the course of or under DOE contracts other than in the nuclear energy field shall vest in the Government, and that all or part of the rights of the Government in such inventions may be waived if it is determined, in conformity with the provisions of Section 9, that the interests of the United States and the general public will best be served by such waiver.

§9-9.107-2 (Reserved).

§9-9.107-3 Policy.

(a) Whenever any invention is made or conceived in the course of or under any contract of DOE, title to such invention shall vest in the United States unless the Head of the Agency or designee waives all or any part of the rights of the United States in the invention. While waivers are to be granted only in conformity with the specific minimum considerations and under the carefully delineated conditions set forth in §9-9.109-6, it is recognized that waivers comprise a necessary part of the commercialization incentives available to DOE. It is intended, therefore, that waivers will be provided in appropriate situations to encourage industrial participation and foster rapid commercial utilization in the overall best interest of the United States and the general public. With regard to any waivers granted under this Part 9-9, DOE shall maintain a publicly available, periodically updated record of such waiver determinations.

(b) In contracts having as a purpose the conduct of research, development or demonstration work and in other special contracts, the Government shall normally acquire title in and to any invention or discovery conceived or first actually reduced to practice in the course of or under the contract, allowing the contractor to retain a nonexclusive, revocable, paid-up license in the invention and the right to file and retain title in any foreign country in which the Government does not elect to secure patent rights. The contractor's nonexclusive license retained in the invention may be revoked or modified by DOE only to the extent necessary to achieve expeditious practical application of the invention pursuant to an applicaton for and the grant of an exclusive license in the invention.

(c) In contracts having as a purpose the conduct of research, development, or demonstration work and in other special contracts, the Government may have to acquire the right to require licensing of background patent rights by the contractor to insure reasonable public availability and accessibility necessary to practice the subject of the contract in the fields of technology specifically contemplated in the contract effort. The need for background patent rights and the particular rights that should be obtained for either the Government or the public will depend upon the type, purpose, and scope of the contract effort, and the cost to the Government of obtaining such rights. Accordingly, the background patent rights provision which will be appropriate for many contract situations is included in the Patent Rights clause.

(d) Nothing in this Part 9-9 shall be deemed to convey to any individual, corporation or other business organization immunity from civil or criminal liability, or to create defenses to actions under the antitrust laws.

§9-9.107-4 Procedures.

(a) Selection of Patent Rights clause.

(1) Whenever a contract, subcontract or other arrangement has as a purpose the conduct of research, development, or demonstration work, the operation of a Government-owned research or production facility, the furnishing of architect-engineer, design or other special services, or the coordination and direction of the work of others, the Contracting Officer shall

include in the proposed contract either the Patent Rights clause of §9-9.107-5(a), or the clause of §9-9.107-6. The clause set forth in §9-9.107-6 may be used only in contracts calling for basic or applied research work with nonprofit or educational institutions or in certain consultant contracts as set forth in paragraph (a)(5) of this section.

(2) The Patent Rights clauses of §9-9.107-5(a) and §9-9.107-6 provide that the Government shall acquire title to each invention made (i.e., conceived or first actually reduced to practice) in the course of or under the contract. However, the contractor shall retain in such invention a nonexclusive, revocable license and, subject to DOE security requirements and regulations, may file and retain title in any foreign country in which the Government does not elect to secure patent rights. The contractor or the inventor may also retain greater rights than these after an invention has been identified and reported to DOE if the Secretary or designee determines that the interests of the United States and the general public will best be served by a waiver of such rights, utilizing the considerations set forth in §9-9.109-6.

(3) The Patent Rights clauses shall normally include the provisions set forth in paragraph (l) of the clause in §9-9.107-5(a) and paragraph (f) of the clause in §9-9.107-6. If the Contracting Officer determines that the work to be performed under the contract would not be useful in the production or utilization of special nuclear material or atomic energy, paragraphs (l) or (f) may be omitted.

(4) The primary missions of DOE may require that certain rights in the contractor's privately developed background patents be acquired for the Government's future production, research, development, and demonstration projects. Similar rights may also be required to enable private parties to utilize a subject of the contract in the fields of technology specifically contemplated in the contract effort. To this end, subject to specified exceptions and negotiations, the Patent Rights clause in contracts over $250,000 shall normally include provisions obtaining rights of the type specified in §9-9.107-5 to such background patents. It is recognized that the precise rights to be acquired will depend upon the facts of each situation and are a matter for determination by DOE and for negotiation with the contractor. General guidelines for use by Contracting Officers and contract negotiators are provided in §9-9.107-5(b).

(5) The short form Patent Rights clause in §9-9.107-6 may be used in contracts calling for basic or applied research where the contractor is a nonprofit or educational institution, and in special situations such as consultant contracts. However, this clause will not be used in contracts in which an advance waiver or greater rights has been granted, in certain consultant contracts as explained in §9-9.107-6, or in other special contracts.

(6) Solicitations and proposed contracts shall provide offerors and prospective contractors with notice of and the right to request, in advance of or within 30 days after the effective date of contracting, or such longer period as may be authorized by the Patent Counsel (with notification by the Patent Counsel to the Contracting Officer) for good cause shown in writing by the contractor or inventor, a waiver of all or any part of the rights of the United States with respect to subject inventions. In no event will the fact that an offeror has requested such a waiver be a consideration in the evaluation of the offer or the determination of its acceptability. If an advance waiver is granted, the Patent Rights clause of § 9-9.107-5(a) shall be used and appropriately modified in accordance with the terms of such waiver. To provide adequate notice to prospective contractors or offerors, the following provision will be inserted in all solicitations which may result in contracts calling for research, development, or demonstration:

> Offerors and prospective contractors, in accordance with applicable statutes and DOE Regulations (41 CFR §9-9.109-6), have the right to request in advance of or within 30 days after the effective date of contracting a waiver of all or any part of the rights of the United States in subject inventions.

(7) DOE may make restricted data applicable to civil uses of atomic energy available to contractors or other persons requiring such data for use in their contracts, business, trade,

or profession. In such instances, the special terms and conditions of the type set forth in 10 CFR 725.23(b) and (d) should be used instead of the provision set forth in this part.

(b) License for the Government, states, and domestic municipal governments.

When a waiver is granted or foreign rights are retained by either the contractor or the inventor, the Government shall retain for the United States, States, and domestic municipal governments at least a paid-up, nonexclusive, irrevocable license in all applicable inventions unless the Head of the Agency or designee determines that it would not be in the public interest to acquire such rights for the States and domestic municipal governments. Requests by contractors for such determinations, together with justifications therefor, shall be submitted to the Contracting Officer. The Contracting Officer shall refer such requests to the Patent Counsel assisting the procuring activity forwarding the request, along with appropriate comments and recommendations, to the Assistant General Counsel for Patents to serve as a basis for the above referenced determination by the Head of the Agency or designee.

(c) Right to sublicense foreign governments.

The Patent Rights clause does not provide the Government with the right to grant sublicenses to a foreign government, pursuant to any treaty or agreement, in subject inventions to which the contractor has been granted greater or foreign rights. The Head of the Agency or designee may determine at the time of contracting that it would be in the national interest to acquire this right, or the Head of the Agency or designee may reserve the right to make this determination after the invention is identified. When such a determination is made or such right is reserved, the Patent Rights clause should be amended as set forth in §9-9.107-5(d).

(d) License rights (upon request) to the contractor.

Paragraph (c) of the Patent Rights (long form) clause of §9-9.107-5(a) specifies the license rights retained by the contractor in inventions made in the course of or under the contract. In appropriate circumstances, such as in contracts for the operation of Government-owned facilities or special long term, cost-reimbursement, Government-funded research, development, or demonstration work, this provision shall be modified to provide a revocable, nonexclusive, royalty-free license in inventions only upon request by the contractor for reservation of such license. In such situations, the paragraph set forth in §9-9.107-5(e) shall be substituted for paragraph (c)(1) of the Patent Rights (long form) clause. However, in programs of the type discussed in §9-9.107-4(a)(7), or in certain contracts or subcontracts involving access to restricted data, royalty-free licenses shall not necessarily be granted with respect to inventions or discoveries resulting from the contractor's or subcontractor's access to restricted data.

(e) License rights to contractor (irrevocable).

Paragraph (c)(1) of the Patent Rights (long form) clause specifies that the license rights retained by the contractor in such inventions are revocable. In special circumstances the license may be irrevocable, in which case paragraph (c)(1) set forth in §9-9.107-5(f) shall be substituted for paragraphs (c)(1), (c)(2) and (c)(3) of the Patent Rights (long form) clause. Because granting irrevocable licenses may interfere with DOE's licensing program which is intended to promote the commercial utilization of inventions resulting from its research, development, or demonstration programs, contractors desiring irrevocable licenses shall submit a written request with a justification to the Contracting Officer. The Contracting Officer shall refer such request to the Patent Counsel assisting the procuring activity forwarding the request, along with appropriate comments and recommendations, to the Assistant General Counsel for Patents to serve as a basis for approval by the Head of the Agency or designee.

(f) Contractor sublicensing.

The rights of a contractor having a license as set forth in paragraphs (d) and (e) above to grant a revocable license to one or more sublicensees may be considered appropriate by the

Head of the Agency or designee in certain circumstances such as, where the contractor is cost-sharing; where the contractor's control or involvement in the technology which is the subject of the contract is substantial; where the reservation of licensing rights in the contractor would best promote commercialization or utilization of the technology; or where substantial segments of the user population already have licenses or would otherwise be licensed. In such situations, the paragraph in §9-9.107-5(g)(1) may be substituted for paragraph (c)(1) of §9-9.107-5(a), or the paragraphs in §9-9.107-5(g)(2) may be substituted for paragraphs (c)(1), (c)(2), and (c)(3) of §9-9.107-5(a), as appropriate.

(g) Facilities license.

Whenever a contract has as a purpose, the design, construction, or operation of a Government-owned research, development, demonstration or production facility, it is necessary that the Government be accorded certain rights with respect to further use of the facility by or on behalf of the Government upon termination of the contract, including the right to make, use, transfer, or otherwise dispose of all articles, materials, products, or processes embodying inventions or discoveries used or embodied in the facility regardless of whether or not conceived or actually reduced to practice under or in the course of such a contract. Accordingly, paragraph §9-9.107-5(h) shall be used in all such contracts in addition to the provisions of the "long form" Patent Rights clause.

(h) Subcontracts.

(1) The policy expressed in §9-9.107-3 is applicable to prime contracts and to subcontracts regardless of tier. The Patent Rights clause of §9-9.107-5(a) or §9-9.107-6 shall be included in all subcontracts having as a purpose, the conduct of research, development, or demonstration work. However, the Patent Rights clause contained in the prime contract is not to be deemed automatically appropriate for subcontracts. For example, it would not be appropriate to the extent that waivers have been granted the prime contractor at the time of contracting. A separate waiver, if any, must be obtained by subcontractors. Further, the withholding of payment provision of the prime contract will not normally be included in a subcontract except upon request of the Contracting Officer and except for subcontracts awarded by contractors who operate Government-owned facilities and for special contracting situations, in which cases the withholding of payment provision may be flowed down to the first-tier subcontractor only. Whenever either the prime contractor or a proposed subcontractor considers the inclusion of the Patent Rights clause of §9-9.107-5(a) or §9-9.107-6 to be inappropriate, or the subcontractor refuses to accept such a clause in its subcontract, the matter shall be referred, prior to award of the subcontract, to the Contracting Officer for a resolution in accordance with §9-9.107-4(k). Upon such referral, the same considerations and procedures followed in selecting the appropriate Patent Rights clause included in the prime contract shall be used in selecting the subcontractor clause.

(2) Contractors shall not use their ability to award subcontracts as economic leverage to acquire rights for themselves in the inventions resulting from subcontracts, and a waiver granted to a prime contractor is not normally applicable to inventions of subcontractors. However, in appropriate circumstances, the prime contractor's waiver may be made applicable to the inventions of any or all subcontractors such as, where there are pre-existing special research and development arrangements between the prime contractor and subcontractor, or where the prime contractor and subcontractor are partners in a cooperative effort. In addition, in such circumstances, the prime contractor may be permitted to acquire nonexclusive licenses in the subcontractor's inventions when a waiver for subcontractor inventions is not applicable.

(i) Record of decisions.

Patent Counsel assisting the procuring activity shall record the basis for the following actions: (1) waivers at the time of contracting; (2) waivers granted on identified inventions; (3) determinations that no license need be obtained for States or domestic municipal governments; (4) determinations that the right to sublicense foreign governments should be obtained; and (5) the grant of irrevocable licenses.

(j) Publication of invention disclosures.

The Patent Rights clauses specify that the Government may duplicate and disclose invention disclosures reported under the contract, although it is not DOE's practice to publish invention disclosures. Because public disclosure before the filing of a U.S. patent application may create a bar to filing certain foreign applications, the clauses also require that patent approval for release or publication of information relating to the contract work be secured from Patent Counsel prior to any such release or publication. When the contractor has requested or obtained a waiver, or has advised of its interest in obtaining certain foreign filing rights, provision is made for DOE to use its best efforts to withhold release or publication of such information for a specified time period in accordance with paragraph (d)(1) of the clause in §9-9.107-5(a) to permit the timely filing of a U.S. patent application by the contractor.

(k) Negotiations and deviations.

Contracting Officers shall contact the field Patent Counsel assisting their procuring activity or the Assistant General Counsel for Patents, for assistance in selecting, negotiating, or approving appropriate patent, copyright, and data clauses. It should be noted that such clauses may be involved in and affected by the negotiations for a patent waiver. In the case of field procuring activities, Patent Counsel will coordinate such review and assistance with the Chief Counsel in accordance with established local procedures. Any intended departures or deviations from the Federal Procurement Regulations shall be referred by the Contracting Officer to the Assistant General Counsel for Patents for review and concurrence prior to obtaining approval in accordance with §9-1.009-2. A deviation amounting to a class deviation to the FPR or the DOE-PR shall be forwarded through the Assistant General Counsel for Patents to the Senior Procurement Official, Headquarters.

§9-9.107-5 Clause for domestic contracts (long form).

(a) Patent Rights clause.

When the Contracting Officer has determined that a contract falls within §9-9.107-4(a)(1), except where the clause of §9-9.107-6 is applicable, the following clause shall be included in the contract.

PATENT RIGHTS (LONG FORM)

(a) Definitions.

(1) "Subject invention" means any invention or discovery of the contractor conceived or first actually reduced to practice in the course of or under this contract, and includes any art, method, process, machine manufacture, design or composition of matter, or any new and useful improvement thereof, or any variety of plants whether patented or unpatented under the Patent Laws of the United States of America or any foreign country.

(2) "Contract" means any contract, grant, agreement, understanding, or other arrangement, which includes research, development, or demonstration work, and includes any assignment or substitution of parties.

(3) "States and domestic municipal governments" means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, and any political subdivision and agencies thereof.

(4) "Government agency" includes an executive department, independent commission, board, office, agency, administration, authority, government corporation, or other Government establishment of the Executive Branch of the Government of the United States of America.

(5) "To the point of practical application" means to manufacture, in the case of a composition or product, to practice in the case of a process, or to operate in the case of a machine and under such conditions as to establish that the invention is being worked and that its benefits are reasonably accessible to the public.

(6) "Patent Counsel" means the Department of Energy Patent Counsel assisting the procuring activity.

(b) Allocation of principal rights.

(1) Assignment to the Government.

The contractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are retained by the contractor under paragraphs (b)(2) and (c) of this clause.

(2) Greater rights determinations.

The contractor or the employee-inventor with authorization of the contractor may request greater rights than the nonexclusive license and the foreign patent rights provided in paragraph (c) of this clause on identified inventions in accordance with 41 CFR §9-9.109-6(d). Such requests must be submitted to Patent Counsel (with notification by Patent Counsel to the Contracting Officer) at the time of the first disclosure pursuant to paragraph (e)(2) of this clause, or not later than 9 months after conception or first actual reduction to practice, whichever occurs first, or such longer periods as may be authorized by Patent Counsel (with notification by Patent Counsel to the Contracting Officer) for good cause shown in writing by the contractor.

(c) Minimum rights to the contractor.

(1) Contractor license.

The contractor reserves a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government acquires title. The license shall extend to the contractor's domestic subsidiaries and affiliates, if any, within the corporate structure of which the contractor is a part and shall include the right to grant sublicenses of the same scope to the extent the contractor was legally obligated to do so at the time the contract was awarded. The license shall be transferable only with approval of DOE except when transferred to the successor of that part of the contractor's business to which the invention pertains.

(2) Revocation limitations.

The contractor's nonexclusive license retained pursuant to paragraph (c)(1) of this clause and sublicenses granted thereunder may be revoked or modified by DOE, either in whole or in part, only to the extent necessary to achieve expeditious practical application of the subject invention under DOE's published licensing regulations (10 CFR 781), and only to the extent an exclusive license is actually granted. This license shall not be revoked in that field of use and/or the geographical areas in which the contractor, or its sublicensee, has brought the invention to the point of practical application and continues to make the benefits of the invention reasonably accessible to the public, or is expected to do so within a reasonable time.

(3) Revocation procedures.

Before modification or revocation of the license or sublicense, pursuant to paragraph (c)(2) of this clause, DOE shall furnish the contractor a written notice of its intention to modify or revoke the license and any sublicense thereunder, and the contractor shall be allowed 30 days, or such longer periods as may be authorized by the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) for good cause shown in writing by the contractor, after such notice to show cause why the license or any sublicense should not be modified or revoked. The contractor shall have the right to appeal, in accordance with 10 CFR 781, any decision concerning the modification or revocation of his license or any sublicense.

(4) Foreign patent rights.

Upon written request to Patent Counsel (with notification by Patent Counsel to the Contracting Officer), and subject to DOE security regulations and requirements, there shall be reserved to the contractor, or the employee inventor with authorization of the contractor, the patent rights to a subject invention in any foreign country where the Government has elected not to secure such rights provided:

(i) The recipient of such rights, when specifically requested by DOE and three years after issuance of a foreign patent disclosing said subject invention, shall furnish DOE a report setting forth:

(A) The commercial use that is being made, or is intended to be made, of said invention, and

(B) The steps taken to bring the invention to the point of practical application or to make the invention available for licensing.

(ii) The Government shall retain at least an irrevocable, nonexclusive, paid-up license to make, use, and sell the invention throughout the world by or on behalf of the Government (including any Government agency) and States and domestic municipal governments, unless the Head of the Agency or designee determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments.

(iii) Subject to the rights granted in (c)(1), (2) and (3) of this clause, the Head of the Agency or designee shall have the right to terminate the foreign patent rights granted in this paragraph (c)(4) in whole or in part unless the recipient of such rights demonstrates to the satisfaction of the Head of the Agency or designee that effective steps necessary to accomplish substantial utilization of the invention have been taken or within a reasonable time will be taken.

(iv) Subject to the rights granted in (c)(1), (2) and (3) of this clause, the Head of the Agency or designee shall have the right, commencing four years after foreign patent rights are accorded under this paragraph (c)(4), to require the granting of a nonexclusive or partially exclusive license to a responsible applicant or applicants, upon terms reasonable under the circumstances, and in appropriate circumstances to terminate said foreign patent rights in whole or in part, following a hearing upon notice thereof to the public, upon a petition by an interested person justifying such hearing:

(A) If the Head of the Agency or designee determines, upon review of such material as he deems relevant, and after the recipient of such rights or other interested person has had the opportunity to provide such relevant and material information as the Head of the Agency or designee may require, that such foreign patent rights have tended substantially to lessen competition or to result in undue market concentration in any section of the United States in any line of commerce to which the technology relates; or

(B) Unless the recipient of such rights demonstrates to the satisfaction of the Head of the Agency or designee at such hearing that the recipient has taken effective steps, or within a reasonable time thereafter is expected to take such steps, necessary to accomplish substantial utilization of the invention.

(d) Filing of patent applications.

(1) With respect to each subject invention in which the contractor or the inventor requests foreign patent rights in accordance with paragraph (c)(4) of this clause, a request may also be made for the right to file and prosecute the U.S. application on behalf of the U.S. Government. If such request is granted, the contractor or inventor shall file a domestic patent application on the invention within 6 months after the request for foreign patent rights is granted, or such longer period of time as may be approved by the Patent Counsel for good cause shown in writing by the requestor. With respect to the invention, the requestor shall promptly notify the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) of any decision not to file an application.

(2) For each subject invention on which a domestic patent application is filed by the contractor or inventor, the contractor or inventor shall:

(i) Within 2 months after the filing of a patent application or within 2 months after submission of the invention disclosure, if the patent application has been filed previously, deliver to the Patent Counsel a copy of the application as filed including the filing date and serial number;

(ii) Within 6 months after filing the application or within 6 months after submitting the invention disclosure if the application has been filed previously, deliver to the Patent Counsel a duly executed and approved assignment to the Government, on a form specified by the Government;

(iii) Provide the Patent Counsel with the original patent grant promptly after a patent is issued on the application; and

(iv) Not less than 30 days before the expiration of the response period for any action required by the Patent and Trademark Office, notify the Patent Counsel of any decision not to continue prosecution of the application.

(3) With respect to each subject invention in which the contractor or inventor has requested foreign patent rights, the contractor or inventor shall file a patent application on the invention in each foreign country in which such request

is granted in accordance with applicable statutes and regulations, and within one of the following periods:

(i) Eight months from the date of filing a corresponding United States application, or if such an application is not filed, six months from the date the request was granted.

(ii) Six months from the date a license is granted by the Commissioner of Patents and Trademarks to file the foreign patent application, where such filing has been prohibited by security reasons; or

(iii) Such longer periods as may be approved by the Patent Counsel for good cause shown in writing by the contractor or inventor.

(4) Subject to the license specified in paragraphs (c)(1), (2) and (3) of this clause, the contractor or inventor agrees to convey to the Government, upon request, the entire right, title, and interest in any foreign country in which the contractor or inventor fails to have a patent application filed in accordance with paragraph (d)(3) of this clause, or decides not to continue prosecution or to pay any maintenance fees covering the invention. To avoid forfeiture of the patent application or patent, the contractor or inventor shall, not less than 60 days before the expiration period for any action required by any patent office, notify the Patent Counsel of such failure or decision, and deliver to the Patent Counsel, the executed instruments necessary for the conveyance specified in this paragraph.

(e) Invention identification, disclosures, and reports.

(1) The contractor shall establish and maintain active and effective procedures to ensure that subject inventions are promptly identified and timely disclosed. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records that are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records which show that the procedures for identifying and disclosing the inventions are followed. Upon request, the contractor shall furnish the Contracting Officer a description of these procedures so that he may evaluate and determine their effectiveness.

(2) The contractor shall furnish the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) on a DOE-approved form:

(i) A written report containing full and complete technical information concerning each invention within 6 months after conception or first actual reduction to practice, whichever occurs first in the course of or under this contract, but in any event, prior to any sale, public use, or public disclosure of such invention known to the contractor. The report shall identify the contract and inventor and shall be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the invention pertains, a clear understanding of the nature, purpose, operation, and to the extent known, the physical, chemical, biological, or electrical characteristics of the invention. The report should also include any request for foreign patent rights under paragraph (c)(4) of this clause and any request to file a domestic patent application under (d)(1) of this clause. However, such request shall be made within the period set forth in paragraph (b)(2) of this clause. When an invention is reported under this paragraph (e)(2)(i), it shall be presumed to have been conceived or first actually reduced to practice in the course of or under the contract, unless the contractor contends it was not so made, in accordance with paragraph (g)(2)(ii) or this clause.

(ii) Upon request, but not more than annually, interim reports on a DOE-approved form listing subject inventions and subcontracts award(s) containing a Patent Rights clause for that period and certifying that:

(A) The contractor's procedures for identifying and disclosing subject inventions as required by this paragraph (e) have been followed throughout the reporting period;

(B) All subject inventions have been disclosed or that there are no such inventions; and

(C) All subcontracts containing a Patent Rights clause have been reported or that no such subcontracts have been awarded;

(iii) A final report on a DOE-approved form within three months after completion of the contract work listing all subject inventions and all subcontracts awarded containing a Patent Rights clause and certifying that:

(A) All subject inventions have been disclosed or that there were no such inventions; and

(B) All subcontracts containing a Patent Rights clause have been reported or that no such subcontracts have been awarded.

(3) The contractor shall obtain patent agreements to effectuate the provisions of this clause from all persons in its employ who perform any part of the work under this contract except nontechnical personnel, such as clerical employees and manual laborers.

(4) The contractor agrees that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause. If the contractor is to file a foreign patent application on a subject invention, the Government agrees, upon written request, to use its best efforts to withhold publication of such invention disclosures until the expiration of the time period specified in paragraph (d)(1) of this clause, but in no event shall the Government or its employees be liable for any publication thereof.

(f) Publication.

It is recognized that during the course of the work under this contract, the contractor or its employees may from time to time desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract. In order that public disclosure of such information will not adversely affect the patent interests of DOE or the contractor, patent approval for release or publication shall be secured from Patent Counsel prior to any such release or publication.

(g) Forfeiture of rights in unreported subject inventions.

(1) The contractor shall forfeit to the Government, at the request of the Head of the Agency or designee, all rights in any subject invention which the contractor fails to report to Patent Counsel (with notification by Patent Counsel to the Contracting Officer) within 6 months after the time the contractor:

(i) Files or causes to be filed a United States or foreign patent application thereon; or

(ii) Submits the final report required by paragraph (e)(2)(iii) of this clause, whichever is later.

(2) However, the contractor shall not forfeit rights in a subject invention if, within the time specified, in (1)(i) or (1)(ii) of this paragraph (g), the contractor:

(i) prepares a written decision based upon a review of the record that the invention was neither conceived nor first actually reduced to practice in the course of or under the contract and delivers the same to Patent Counsel (with notification by Patent Counsel to the Contracting Officer); or

(ii) contending that the invention is not a subject invention, the contractor nevertheless discloses the invention and all facts pertinent to this contention to the Patent Counsel (with notification by Patent Counsel to the Contracting Officer); or

(iii) establishes that the failure to disclose did not result from the contractor's fault or negligence.

(3) Pending written assignment of the patent application and patents on a subject invention determined by the Head of the Agency or designee to be forfeited (such determination to be a final decision under the Disputes clause of this contract), the contractor shall be deemed to hold the invention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this paragraph (g) shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to subject inventions.

(h) Examination of records relating to inventions.

(1) The Contracting Officer or his authorized representative, until the expiration of 3 years after final payment under this contract, shall have the right to examine any books (including laboratory notebooks), records, documents, and other supporting data of the contractor which the Contracting Officer or his authorized representative reasonably deem pertinent to the discovery or identification of subject inventions or to determine compliance with the requirements of this clause.

(2) The Contracting Officer or authorized representative shall have the right to examine all books (including laboratory notebooks), records and documents of the contractor relating to the conception or first actual reduction to practice of

inventions in the same field of technology as the work under this contract to determine whether any such inventions are subject inventions, if the contractor refuses or fails to:.

(i) Establish the procedures of paragraph (e)(1) of this clause; or

(ii) maintain and follow such procedures; or

(iii) correct or eliminate any material deficiency in the procedures within thirty days after the Contracting Officer notifies the contractor of such a deficiency.

(i) Withholding of payment (not applicable to subcontracts).

(1) Any time before final payment of the amount of this contract, the Contracting Officer may, if he deems such action warranted, withhold payment until a reserve not exceeding $50,000 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if in his opinion the contractor fails to:

(i) establish, maintain and follow effective procedures for identifying and disclosing subject inventions pursuant to paragraph (e)(1) of this clause; or

(ii) disclose any subject invention pursuant to paragraph (e)(2)(i) of this clause; or

(iii) deliver the interim reports pursuant to paragraph (e)(2)(ii) of this clause; or

(iv) provide the information regarding subcontracts pursuant to paragraph (j)(5) of this clause; or

(v) convey to the Government, using a DOE-approved form, the title and/or rights of the Government in each subject invention as required by this clause.

(2) The reserve or balance shall be withheld until the Contracting Officer has determined that the contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) Final payment under this contract shall not be made by the Contracting Officer before the contractor delivers to Patent Counsel all disclosures of subject inventions and other information required by (e)(2)(i) of this clause, the final report required by (e)(2)(iii) of this clause, and Patent Counsel has issued a patent clearance certification to the Contracting Officer.

(4) The Contracting Officer may, in his discretion, decrease or increase the sums withheld up to the maximum authorized above. If the contractor is a nonprofit organization, the maximum amount that may be withheld under this paragraph shall not exceed $50,000 or 1 percent of the amount of this contract, whichever is less. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or subsequent payment thereof shall not be construed as a waiver of any rights accruing to the Government under this contract.

(j) Subcontracts.

(1) For the purpose of this paragraph the term "contractor" means the party awarding a subcontract and the term "subcontractor" means the party being awarded a subcontract, regardless of tier.

(2) Unless otherwise authorized or directed by the Contracting Officer, the contractor shall include the Patent Rights clause of 41 CFR §9-9.107-5(a) or 41 CFR §9-9.107-6 as appropriate, modified to identify the parties in any subcontract hereunder having as a purpose the conduct of research, development, or demonstration work. In the event of a refusal by a subcontractor to accept this clause, or if in the opinion of the contractor this clause is inconsistent with DOE's patent policies, the contractor:

(i) shall promptly submit written notice to the Contracting Officer setting forth reasons for the subcontractor refusal and other pertinent information which may expedite disposition of the matter; and

(ii) shall not proceed with the subcontract without the written authorization of the Contracting Officer.

(3) Except as may be otherwise provided in this clause, the contractor shall not, in any subcontract by using a subcontract as consideration therefor, acquire any rights in its subcontractor's subject invention for the contractor's own use (as distinguished from such rights as may be required solely to fulfill the contractor's

contract obligations to the Government in the performance of this contract).

(4) All invention disclosures, reports, instruments, and other information required to be furnished by the subcontractor to DOE, under the provisions of a Patent Rights clause in any subcontract hereunder may, in the discretion of the Contracting Officer, be furnished to the contractor for transmission to DOE.

(5) The contractor shall promptly notify the Contracting Officer in writing upon the award of any subcontract containing a Patent Rights clause by identifying the subcontractor, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon the request of the Contracting Officer, the contractor shall furnish a copy of the subcontract.

(6) The contractor shall identify all subject inventions of the subcontractor of which it acquires knowledge in the performance of this contract and shall notify the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) promptly upon the identification of the inventions.

(7) It is understood that the Government is a third party beneficiary of any subcontract clause granting rights to the Government in subject inventions, and the contractor hereby assigns to the Government all rights that the contractor would have to enforce the subcontractor's obligations for the benefit of the Government with respect to subject inventions. The contractor shall not be obligated to enforce the agreements of any subcontractor hereunder relating to the obligations of the subcontractor to the Government regarding subject inventions.

(k) Background Patents.

(1) "Background Patent" means a domestic patent covering an invention or discovery which is not a subject invention and which is owned or controlled by the contractor at any time through the completion of this contract:

(i) Which the contractor, but not the Government, has the right to license to others without obligation to pay royalties thereon, and

(ii) Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture or composition of matter (including relatively minor modificatons thereof) which is a subject of the research, development, or demonstration work performed under this contract.

(2) The contractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive, license under any background patent for purposes of practicing a subject of this contract by or for the Government in research, development, and demonstration work only.

(3) The contractor also agrees that upon written application by DOE, it will grant to responsible parties for purposes of practicing a subject of this contract, nonexclusive licenses under any background patent on terms that are reasonable under the circumstances. If, however, the contractor believes that exclusive or partially exclusive rights are necessary to achieve expeditious commercial development or utilization, then a request may be made to DOE for DOE approval of such licensing by the contractor.

(4) Nothwithstanding the foregoing paragraph (k)(3), the contractor shall not be obligated to license any background patent if the contractor demonstrates to the satisfaction of the Head of the Agency or designee that:

(i) a competitive alternative to the subject matter covered by said background patent is commercially available or readily introducible from one or more other sources; or

(ii) the contractor or its licensees are supplying the subject matter covered by said background patent in sufficient quantity and at reasonable prices to satisfy market needs, or have taken effective steps or within a reasonable time are expected to take effective steps to so supply the subject matter.

(l) Atomic energy.

(1) No claim for pecuniary award or compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted by the contractor or its employees with respect to any invention or discovery made or conceived in the course of or under this contract.

(2) Except as otherwise authorized in writing by the Contracting Officer, the contractor will obtain patent agreements to effectuate the provisions of para-

graph (l)(1) of this clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

(m) Limitation of rights.

Nothing contained in this patent rights clause shall be deemed to give the Government any rights with respect to any invention other than a subject invention except as set forth in the Patent Rights clause of this contract with respect to background patents and if included the facilities license.

(b) Licenses in contractor background patents.

(1) It will normally be the case that a contractor qualified to perform work under a DOE contract will have developed a degree of expertise in the general field of activity to which the contract relates. Accordingly, it will not be unusual for a prospective contractor to have an established patent position relating to the general field of work to be performed under the contract and to have ongoing research and development programs in that general field which could result in patentable inventions. Because the contractor is obligated to apply its best efforts to accomplishing the objectives of the contract work, it is to be expected that inventions owned or controlled by the contractor at any time during the contract period may be utilized in connection with the work performed under the contract. If such inventions are or become the subject of a patent, such patented inventions may control a subject of the contract.

(2) It is usually the case that at the time the contract is negotiated, such inventions, if any, of the contractor are not known to the Government and may not be known to the contractor either. Use by the contractor of such inventions in connection with the contract work does not necessarily result in a need for rights in those inventions by the Government or others. However, failure of DOE to obtain limited rights on behalf of the Government and/or third parties in a narrow class of those inventions, defined as "background patents," could frustrate the objectives of DOE to promptly make the benefits of its programs widely available to the public and to promote the commercial utilization of the technology developed or demonstrated under DOE programs. Therefore, it is DOE's policy to obtain limited license rights in background patents on a basis that is reasonable under the circumstances of the particular contract and takes into account the relative equities of the contractor, the Government and the general public.

(3) Paragraph (k) of the Patent Rights clause of §9-9.107-5 (a) sets out the background patent provisions that will be appropriate for many DOE contracting situations by balancing the needs of DOE programs with the equities of the contractor. This clause obtains a paid-up, nonexclusive license for the Government for research, development, and demonstration work only and thus includes any use of the background patents under DOE programs where research, development, or demonstration work is being conducted. The clause also requires the contractor to license responsible parties on reasonable terms at the request of DOE in the field of technology specifically contemplated in the contract effort. The background patent provisions, however, are only applicable insofar as infringement of the patents cannot reasonably be avoided in order to utilize the results of the contract work for these purposes. Additionally, the clause is not effective if the contractor can demonstrate to the satisfaction of the Head of the Agency or designee that commercial alternatives are available or readily introducible from one or more sources, or that the contractor or its licensees are supplying the market in sufficient quantities and at reasonable prices or have taken effective steps, or within a reasonable time are expected to take effective steps, to so supply the market. In determining whether to request such licensing, DOE will recognize the need, where appropriate, to limit licensing to preserve the commercialization incentives provided by the patent, and also to meet the needs of the public for early availability of the technology.

(4) Subparagraph (k)(1) defines those inventions which will fall within the definition of what constitutes a background patent, while subparagraphs (k)(2) and (k)(3) define the scope or field of use of any license granted. Although DOE, as stated in paragraph (3), controls the requesting of licenses to responsible parties, the final resolution of questions regarding the scope

of such licenses and the terms thereof, including reasonable royalties, are then left to the negotiation of the parties with final resolution of the issues being made by a court of competent jurisidiction if necessary. In subparagraph (k)(4), the decision not to apply the licensing requirement of subparagraph (k)(3), however, is subject to the final decision of the Head of the Agency or designee. The final authority of DOE in these decisions is required because the determinations are dependent in substantial part on the requirement of DOE's specific mission.

(5) Balancing of the respective equities in particular contracting situations, however, may require that paragraph (k) be modified. Paragraph (k) should normally be deleted for contracts under $250,000 and may not be appropriate in certain types of study contracts, planning contracts, contracts with educational institutions, and contracts for specialized equipment for in-house Government use or not intended for further procurement by the Government or for use by the public. Except for the deletion of paragraph (k) in contracts under $250,000 as permitted in this paragraph (5), deletions or modifications of paragraph (k) as set forth in this section are to be made with the advice of Patent Counsel.

(6) On the other hand, there will be situations where the equities between the Government and the contractor, or anticipated Government needs, would require that rights be obtained for either the Government or for the public greater than those set forth in paragraph (k). For example, where (i) the contribution of the Government towards the development and/or commercialization of the background patent is substantially greater than that of the contractor, (ii) it is expected that the Government may be involved in special long-term projects, or (iii) the Government may require substantial production, procurement or utilization for purposes outside of research, development, and demonstration, it may be necessary to obtain greater rights. In such situations, consideration should be given to extending the Government's rights beyond research, development, and demonstration work, or to adjust royalties (that may be due by the Government) to reflect the Government's contribution. Such adjustment could take the form of (i) credit to be given the Government based upon its contribution through the contract, or (ii) a royalty based upon the relative contributions of the contractor and the Government. Consideration could also be given to utilizing the relative contributions in determining reasonable royalties to be charged to others.

(7) Similarly, it may be necessary to obtain greater rights for the public in the contractor's background patents where, for example, the contractor's background patents cover the basic technology intended to be developed under the contract effort, rather than components or products or processes which are ancillary thereto. In such cases, subparagraph (4) might also be appropriate where the future market for the subject of the contract will be very large and there are presently only a few suppliers available.

(8) It may also be appropriate to modify the rights acquired by paragraph (k) where the contractor's background patent rights were of primary importance in granting the contractor a waiver. For example, if the contractor was permitted to retain exclusive rights to subject inventions based upon the consideration that both foreground and background inventions would be licensed at reasonable royalties, then paragraph (k) should be modified. The modification may be made applicable to the fields of technology, inventions, or other aspects of the contract. Concomitant with such modification, the licensing obligations for subject inventions should also be modified to be compatible therewith. In such cases, the definition of "background patent" should be broadened to include all patents useful in the practice of a subject of the contract, and subparagraph (k)(4) should be deleted or appropriately modified.

(9) The application of paragraph (k) is limited to the practice of any specific process, method, or machine, manufacture, or composition of matter which is a subject of research, development, or demonstration work performed under the contract, otherwise referred to as "subject of this contract" in subparagraphs (2) and (3). The expression "a subject of this contract" is intended to limit the licensing required in paragraph (k) to the fields of technology specifically contemplated in the contract effort. During negotiations, when the subject matter of the contract is known, a more specific statement of the fields of technology intended to be covered

may be substituted for the expression "subject of this contract." For example, the application of paragraph (k) may be limited to the generation of electric power utilizing coal-derived fuels, to high-temperature, gas cooled reactors, or other specified fields of technology of interest to DOE programs.

(10) The considerations and statements in the foregoing paragraphs (1)-(9) also apply to the negotiation, application, and inclusion of background patent rights provisions in subcontracts.

(c) License for the States and domestic municipal governments.

When the Head of the Agency or designee determines at the time of contracting that it would not be in the public interest to acquire a paid-up license in subject inventions for States and domestic municipal governments, paragraph (c)(4)(ii) of the Patent Rights clause in §9-9.107-5(a) shall be replaced with the following paragraph:

> (ii) The Government shall retain at least an irrevocable, nonexclusive, paid-up license to make, use, and sell the invention throughout the world by or on behalf of the Government of the United States (including any Government agency).

(d) Right to sublicense foreign governments.

(1) When the Head of the Agency or designee determines at the time of contracting that it would be in the national interest to acquire the right to sublicense foreign governments pursuant to any treaty or agreement, a sentence shall be added to the end of paragraph (c)(4)(ii) of the Patent Rights clause in §9-9.107-5(a) as follows:

> This license shall include the right of the Government to sublicense foreign governments pursuant to any treaty or agreement with such foreign governments.

(2) When the Head of the Agency or designee wishes to reserve the right to make the determination to sublicense foreign governments pursuant to any treaty or agreement until after the invention has been identified, a sentence shall be added to the end of paragraph (c)(4)(ii) of the Patent Rights clause in §9-9.107-5(a) as follows:

> This license shall include the right of the Government to sublicense foreign governments pursuant to any treaty or agreement with such foreign governments if the Head of the Agency or designee determines after the invention has been identified that it would be in the national interest to acquire this right.

(e) License rights (upon request) to contractor (revocable).

When the Head of the Agency or designee determines at the time of contracting that the contractor may, subject to the provisions of §9-9.107-4(a)(7) (involving access to restricted data), reserve a revocable, nonexclusive, paid-up license in subject inventions, only upon a request by the contractor for the retention of such a license, paragraph (c)(1) of this clause in §9-9.107-5(a) shall be replaced with the following paragraph (c)(1):

> (c)(1) The contractor may reserve upon request a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government acquires the title. The license shall extend to the contractor's domestic subsidiaries and affiliates, if any, within the corporate structure of which the contractor is a part and shall include the right to grant sublicenses of the same scope to the extent the contractor was legally obligated to do so at the time the contract was awarded. The license shall be transferable only with approval of DOE except when transferred to the successor of that part of the contractor's business to which the invention pertains.

(f) License rights to contractor (irrevocable).

When the Head of the Agency or designee determines at the time of contracting that the contractor may reserve an irrevocable, nonexclusive, paid-up license in the inventions resulting from the contract, paragraph (c)(1) of the Patent Rights clause of §9-9.107-5(a) shall be replaced with the following paragraph (c)(1), and paragraphs (c)(2) and (c)(3) of §9-9.107-5(a) and references thereto shall be cancelled:

> (c)(1) The contractor reserves an irrevocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government acquires the title. The license shall extend to the contractor's domestic subsidiaries and affiliates, if any, within the corporate structure of which the contractor is a part and shall include the right to grant sublicenses of the same scope to the extent the contractor was legally obligated to do so at the time the contract was awarded. The license shall be transferable only with approval of DOE except when transferred to the successor of that part of the contractor's business to which the invention pertains.

(g) Contractor sublicense (revocable).

(1) When the Head of the Agency or designee determines at the time of contracting that, as indicated in §9-9.107-4(f), it would be in the interests of the Government to permit a contractor having the right to retain a revocable, nonexclusive license in a subject invention to have the further right to grant one or more sublicensees a revocable license of the same scope, the following paragraph may be substituted for paragraph (c)(1) of the Patent Rights clause in §9-9.107-5(a):

> (c)(1) The contractor reserves a revocable, nonexclusive paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government acquires the title. The license shall extend to the contractor's domestic subsidiaries and affiliates, if any, within the corporate structure of which the contractor is a part and shall include the right to grant revocable, nonexclusive sublicenses of the same scope. The license shall be transferable only with approval of DOE except when transferred to the successor of that part of the contractor's business to which the invention pertains.

(2) Where the contractor has been granted the right to retain an irrevocable, nonexclusive license in a subject invention, and it is determined as in (g)(1) above to leave in the contractor the right to grant one or more revocable sublicenses thereunder, the following three paragraphs will be substituted for paragraphs (c)(1), (c)(2), and (c)(3) of the Patent Rights clause in §9-9.107-5(a):

> (c)(1) Contractor license.
>
> The contractor reserves an irrevocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government acquires title. The license shall extend to the contractor's domestic subsidiaries and affiliates, if any, within the corporate structure of which the contractor is a part and shall include the right to grant revocable, nonexclusive sublicenses which are revocable under the same terms and conditions as set forth in paragraphs (c)(2) and (3) of this clause. The license shall be transferable only with approval of DOE except when transferred to the successor of that part of the contractor's business to which the invention pertains.
>
> (c)(2) Revocation limitations.
>
> Any sublicense granted by the contractor may be revoked or modified by DOE, either in whole or in part, only to the extent necessary to achieve expeditious practical application of the subject invention under DOE's published licensing regulations (10 CFR 781), and only to the extent an exclusive license is actually granted. This sublicense shall not be revoked in that field of use and/or geographical areas in which the contractor, or its sublicensee, has brought the invention to the point of practical application and continues to make the benefits of the invention reasonably accessible to the public, or is expected to do so within a reasonable time.
>
> (c)(3) Revocation procedures.
>
> Before modification or revocation of any sublicense pursuant to paragraph (c)(2) of this clause, DOE shall furnish the contractor and the sublicensee written notice of its intention to modify or revoke the sublicense, and the contractor and the sublicensee shall be allowed 30 days, or such longer period as may be allowed by the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) for good cause shown in writing by the contractor or the sublicensee, after such notice to show cause why the sublicense should not be modified or revoked. The

contractor or the sublicensee shall have the right to appeal in accordance with 10 CFR 781, any decision concerning the modification or revocation of the sublicense.

(h) Facilities license.

The following paragraph will be included as paragraph (n) of the Patent Rights (long form) clause in each contract having as purpose the design, construction, or operation of a Government-owned research, development, demonstration, or production facility. The scope of the license in the following paragraph may, in appropriate situations, be expanded to cover similar facilities.

(n) Facilities license.

In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the contractor, which are owned or controlled by the contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility (1) to practice or to have practiced by or for the Government at the facility, and (2) to transfer such license with the transfer of that facility. The acceptance or exercise by the Government of the aforesaid rights and license shall not prevent the Government at any time from contesting the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

OMB CONTROL NO.: 1901—0021; 1901—0246, for paragraph (a), clause (e)(1), (e)(2) (i), (ii), and (iii).

§9-9.107-6 Clause for domestic contracts (short form).

The following clause may be used instead of the clause of §9-9.107-5(a) in contracts for basic or applied research where the contractor is a nonprofit or educational institution and in special situations including consultant contracts. This clause shall not be used in long term consultancy arrangements for work in DOE programs providing opportunities for specialized work experience at DOE-owned facilities for scientific, engineering, and other employees of private firms and institutions engaged in civilian applications of atomic energy. In such instances consult Patent Counsel. Also, this clause is not to be used in contracts calling for the operation of Government-owned facilities, or contracts in which an advance waiver has been granted, or other special contracts such as those for the conduct of major long-term continuing programs or basic agreements providing for the assignment of new tasks from time to time by mutual agreement.

PATENT RIGHTS (SHORT FORM)

(a) Definitions.

(1) "Subject invention" means any invention or discovery of the contractor conceived or first actually reduced to practice in the course of performance of or under this contract, and includes any art, method, process, machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, or any variety of plants, whether patented or unpatented, under the patent laws of the United States of America or any foreign country.

(2) "Patent Counsel" means the DOE Patent Counsel assisting the procuring activity.

(b) Invention disclosures and reports.

(1) The contractor shall furnish the Patent Counsel (with notification by Patent Counsel to the Contracting Officer):

(i) A written report containing full and complete technical information concerning each subject invention within 6 months after conception or first actual reduction to practice but in any event prior to any on sale, public use, or public disclosure of such invention known to the contractor. The report shall identify the contract and inventor and shall be sufficiently complete in technical detail and appropriately illustrated by sketch or diagram to convey to one skilled in the art to which the invention pertains, a clear understanding of the nature, purpose, operation, and to the extent known, the physical, chemical, biological, or electrical characteristics of the invention;

(ii) Upon request, but not more than annually, interim reports on a DOE-approved form listing subject inventions for that period and certifying that all subject inventions have been disclosed or that there were no such inventions; and

(iii) A final report on a DOE-approved form within 3 months after completion of the contract work listing all subject inventions and certifying that all subject inventions have been disclosed or that there were no such inventions.

(2) The contractor agrees that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to the contract.

(c) Allocation of principal rights.

(1) Assignment to the Government.

The contractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are retained by the contractor under paragraphs (c)(2) and (d) of this clause.

(2) Greater rights determination.

The contractor, or the employee-inventor with authorization of the contractor, may request greater rights than the nonexclusive license and the foreign patent rights provided in paragraph (d) of this clause on identified inventions in accordance with the procedure and criteria of 41 CFR 9-9.109-6(d). A request for a determination of whether the contractor or the employee-inventor is entitled to retain such greater rights must be submitted to the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) at the time of the first disclosure of the invention pursuant to paragraph (b)(1) of this clause or not later than 9 months after conception or first actual reduction to practice, whichever occurs first, or such longer period as may be authorized by the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) for good cause shown in writing by the contractor. The information to be submitted for a greater rights determination is specified in 41 CFR §9-9.109-6(e).

(d) Minimum rights to the contractor.

The contractor reserves a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government acquires title. Revocation shall be in accordance with the procedure of paragraphs (c)(2) and (3) of the clause in 41 CFR §9-9.107-5(a). The contractor also has the right to request foreign rights in accordance with the procedures of paragraph (c)(4) of the clause in 41 CFR §9-9.107-5(a).

(e) Employee and subcontractor agreements.

Unless otherwise authorized in writing by the Contracting Officer, the contractor shall:

(1) Obtain patent agreements to effectuate the provisions of the Patent Rights clause from all persons who perform any part of the work under this contract except nontechnical personnel, such as clerical employees and manual laborers.

(2) Unless otherwise authorized or directed by the Contracting Officer, the contractor shall include the Patent Rights clause of 41 CFR §9-9.107-5(a) or 41 CFR §9-9.107-6, as appropriate, modified to identify the parties in any subcontract hereunder having as a purpose the conduct of research, development, or demonstration work; and

(3) Promptly notify the Contracting Officer in writing upon the award of any subcontract containing a Patent Rights clause by identifying the subcontractor, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon the request of the Contracting Officer, the contractor shall furnish a copy of the subcontract to such requester.

(f) Atomic energy.

(1) No claim for pecuniary award or compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted by the contractor or its employees with respect to any inventions or discovery made or conceived in the course of or under this contract.

> (2) Except as otherwise authorized in writing by the Contracting Officer, the contractor will obtain patent agreements to effectuate the provisions of paragraph (f)(1) of the clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.
>
> (g) Publication.
>
> In order that information concerning scientific or technical developments conceived or first actually reduced to practice in the course of or under the contract is not prematurely published so as to adversely affect patent interest of DOE, the Contractor agrees to submit to the Patent Counsel for patent review a copy of each paper 60 days prior to its intended publication date. The Contractor may publish such information after expiration of a 60-day period following such submission or prior thereto if specifically approved by the Patent Counsel, unless the Contractor is informed (in writing within the 60-day period) that in order to protect patentable subject matter, publication must further be delayed. In this event, publication shall be delayed up to 100 days beyond the 60-day period or such longer period as mutually agreed to.

OMB CONTROL NO.: 1901—0021.

§9-9.107-7 Clause for foreign contracts.

The clauses authorized for contracts in §9-9.107-5(a) and §9-9.107-6 may be modified by the Contracting Officer in consultation with Patent Counsel to meet the requirements peculiar to foreign procurement.

§9-9.108 (Reserved).

§9-9.109 Administration of Patent Rights clauses.

§9-9.109-1 Patent rights follow-up.

It is important that the Government and the contractor know and exercise their rights in inventions conceived or first actually reduced to practice in the course of or under Government contracts in order to ensure their expeditious availability to the public, to enable the Government, the contractor, and the public to avoid unnecessary payment of royalties, and to defend themselves against claims and suits for patent infringement. To attain these ends, contracts having Patent Rights clauses should be so administered that:

(a) Inventions are identified, disclosed, and reported as required by the contract clause;

(b) The rights of the Government in such inventions are established;

(c) When appropriate, patent applications are timely filed and prosecuted by the contractor, the inventor, or by the Government as appropriate;

(d) The filing of patent applications is documented by formal instruments such as licenses or assignments; and

(e) Expeditious commercial utilization of such inventions is achieved.

§9-9.109-2 Follow-up by contractor.

(a) The Patent Rights clause requires contractors to establish and maintain effective procedures to ensure that inventions made under the contract are identified, disclosed, and, when appropriate, patent applications filed, and that the Government's rights therein are established and protected. When it is determined after the award of a contract that the contractor or subcontractor may not have a clear understanding of the rights and obligations of the parties under a Patent Rights clause, a postaward orientation conference or letter should be used by DOE to explain these rights and obligations. When reviewing a contractor's procedures, particular attention shall be given to ascertaining their effectiveness for identifying and disclosing inventions.

(b) A qualified representative of the contractor shall furnish to the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) interim reports upon request, and upon completion of the contract work, a final report setting forth:

(1) A list of all subject inventions made during the reporting period;

(2) A certification that all subject inventions have been disclosed or that there were no such inventions, and that the contractor's procedures for identifying and disclosing inventions have been followed throughout the period; and

(3) A list of all subcontracts entered into during the reporting period which contain a Patent Rights clause, together with copies of such subcontracts (if not earlier furnished to DOE), or a statement that there were no such subcontracts.

(c) Ordinarily, inventions and discoveries will be reported on a Form DOE 213 (copies of which shall be made available by Patent Counsel) or on such other form that has been approved by Patent Counsel. Reporting of inventions promptly before completion of the work under the respective contracts will aid patent clearance. Submission of annual interim reports, where contracts cover an extended period, will also facilitate the disposition of patent matters and expedite the issuance of final patent clearance.
OMB CONTROL NO.: 1901—0021.

§9-9.109-3 Follow-up by Government.

(a) With respect to each contract, subcontract, or other agreement under their jurisdiction, the Heads of Procuring Activities are responsible for:

(1) Assuring compliance with the provisions of Part 9-9 in executing or approving any contracts, subcontracts, other agreements, understandings, or other arrangements, or any supplements thereto. The Patent Counsel assisting their activity should be consulted to ensure that only authorized departure is made from the requirements set forth in these regulations and that all substantive and procedural rights required by section 152 of the Atomic Energy Act of 1954, as amended, or section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974, are obtained;

(2) Transmitting the information requested on the Patent Information Sheet, Form DOE 242, to the Assistant General Counsel for Patents;

(3) Reviewing, in consultation with the contractor, subcontractor, or vendor, arrangements for obtaining adequate patent agreements from employees and others performing work under any contract, subcontract, or other agreements containing patent provisions in favor of the Government. (The form of such patent agreement actually in use or proposed for use shall be forwarded for approval to the Patent Counsel assisting the procuring activity.)

(4) Forwarding a notice of completion or termination of the work and a request for patent clearance to the Assistant General Counsel for Patents for each contract, subcontract, or other agreement containing patent provisions giving rise to rights in the Government; and

(5) Withholding payments due to contractors in accordance with paragraph (i) of the Patent Rights clause of §9-9.107-5(a) until, in the case of interim reports, a determination has been made in consultation with Patent Counsel that existing deficiencies have been corrected or that delivery of all reports, disclosures, and other information have been made, or, in the case of final reports, receipt of written patent clearance certification from the Assistant General Counsel for Patents.

(b) The Assistant General Counsel for Patents, upon receipt of the DOE-approved Patent Information Sheet, will assign the patent responsibility and notify the person who transmits the information sheet of the Patent Counsel assigned to conduct the patent surveillance of the reported contract, subcontract, or other agreement. Upon receipt of the notice of completion or termination as provided in paragraph (a)(4) of this section, a notice of patent clearance will be issued by the Assistant General Counsel for Patents when there has been, to his best knowledge and belief, compliance with the patent provisions.

(c) The Patent Counsel assigned to assist the procuring activity will assist Contracting Officers in selecting and negotiating patent provisions and, in the case of field procuring activities, will coordinate such assistance with the Chief Counsel in accordance with established local procedures. Patent Counsel will generally submit Patent Information Sheets and otherwise assist Heads of Procuring Activities, contractors, Contracting Officers, subcontractors and vendors in: reporting of inventions and discoveries; reviewing and providing patent clearance prior to publication or release of reports and proposed technical articles and prior to public release or disclosure of information regarding scientific and technical developments made in the course of or under the contract; handling claims for patent and copyright infringement; preparation of certificates to initiate patent clearance; and the handling of other patent matters.

(d) Patent application filing and determination of rights to inventions and discoveries.

The Assistant General Counsel for Patents or designee shall:

(1) Make the determination that inventions reported under subparagraph (e)(2)(i) of the Patent Rights clause are subject inventions under the contract;

(2) Determine whether and where patent protection will be obtained on inventions;

(3) Represent DOE before domestic and foreign patent offices;

(4) Accept assignments and instruments confirmatory of the Government's rights to inventions; and

(5) Represent DOE in patent, technical data and copyright matters not specifically reserved to the Head of the Agency or designee under these regulations.

§9-9.109-4 Remedies.

If a contractor operating under a Patent Rights clause fails to establish, maintain, or follow effective procedures for identifying and disclosing inventions as required by the Patent Rights clause or fails to correct any deficiency after notice thereof, the Contracting Officer may require the contractor to make available for examination books, records, and documents relating to inventions in the same field of technology as the contract to enable an agency determination of whether there are such inventions, and may invoke the withholding of payments provision if a contractor fails to disclose an invention deemed by DOE to be a subject invention.

§9-9.109-5 Conveyance of invention rights acquired by the Government.

Whenever the Government acquires the entire rights, title, and interest in an invention pursuant to a contract or by operation of law, assignments shall be obtained from the inventor to the Government, with the consent of the contractor, to perfect or confirm the Government's rights. The form of conveyance of title from the inventor to the contractor must be legally sufficient to convey the rights the contractor has required to convey to the Government.

§9-9.109-6 Waivers

(a) General.

(1) The Head of the Agency or designee may waive all or any part of the rights of the United States (other than certain rights prescribed in paragraph (i) of this section) with respect to any invention or class of inventions made or which may be made by any person or class of persons in the course of or under any contract of DOE, if it is determined that the interests of the United States and the general public as set forth in the Atomic Energy Act of 1954, as amended (42 USC 2182), and the Federal Nonnuclear Energy Research and Development Act of 1974 (42 USC 5908), will best be served by such waivers. In making such determinations, the Head of the Agency or designee shall have the following objectives:

(i) Making the benefits of the energy research, development, and demonstration program widely available to the public in the shortest practicable time;

(ii) Promoting the commercial utilization of such inventions;

(iii) Encouraging participation by private persons in DOE's energy research, development, and demonstration program; and

(iv) Fostering competition and preventing undue market concentration or the creation or maintenance of other situations inconsistent with the antitrust laws.

(2) If it is not possible to attain each of these objectives immediately and simultaneously for any one waiver determination, the Head of the Agency or designee will seek to reconcile these objectives in light of the overall purposes of the DOE patent policy which is governed by Section 152 of the Atomic Energy Act of 1954, as amended, and Section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974.

(3) Over time, however, the application of this waiver policy is expected to attain each of these objectives. In addition to the patent policies provided by legislation, and where not inconsistent therewith, the waiver determinations will also be guided by the revised Presidential Memorandum and Statement of Government Patent Policy issued August 23, 1971 (36 F.R. 16887-16892).

(b) Advance waiver.

In determining whether a waiver to the contractor at the time of contracting will best serve the interests of the United States and the general public, the Head of the Agency or designee shall, as a minimum, specifically include as considerations the following:

(1) The extent to which the participation of the contractor will expedite the attainment of the purposes of the program;

(2) The extent to which a waiver of all or any part of such rights in any or all fields of technology is needed to secure the participation of the particular contractor;

(3) The extent to which the work to be performed under the contract is useful in the production or utilization of special nuclear material or atomic energy;

(4) The extent to which the contractor's commercial position may expedite utilization of the research, development, and demonstration program results;

(5) The extent to which the Government has contributed to the field of technology to be funded under the contract;

(6) The purpose and nature of the contract, including the intended use of the results developed thereunder;

(7) The extent to which the contractor has made or will make substantial investment of financial resources or technology developed at the contractor's private expense which will directly benefit the work to be performed under the contract;

(8) The extent to which the field of technology to be funded under the contract has been developed at the contractor's private expense;

(9) The extent to which the Government intends to further develop to the point of commercial utilization the results of the contract effort;

(10) The extent to which the contract objectives are concerned with the public health, public safety, or public welfare;

(11) The likely effect of the waiver on competition and market concentration;

(12) In the case of a nonprofit educational institution, the extent to which such institution has a technology transfer capability and program approved by the Head of the Agency or designee as being consistent with the applicable policies of this section; and

(13) The small business status of the contractor.

(c) Waiver of identified inventions.

In determining whether a waiver to the contractor or inventor of rights to an identified invention will best serve the interests of the United States and the general public, the Head of the Agency or designee shall, as a minimum, specifically include as considerations the following:

(1) The extent to which such waiver is a reasonable and necessary incentive to call forth private risk capital for the development and commercialization of the invention;

(2) The extent to which the plans, intentions, and ability of the contractor or inventor will obtain expeditious commercialization of such invention;

(3) The extent to which the invention is useful in the production or utilization of special nuclear material or atomic energy;

(4) The extent to which the Government has contributed to the field of technology of the invention;

(5) The purpose and nature of the invention, including the anticipated use thereof;

(6) The extent to which the contractor has made or will make substantial investment of financial resources or technology developed at the contractor's private expense which will directly benefit the commercialization of the inventor;

(7) The extent to which the field of technology of the invention has been developed at the contractor's expense;

(8) The extent to which the Government intends to further develop the invention to the point of commercial utilization;

(9) The extent to which the invention is concerned with the public health, public safety, or public welfare;

(10) The likely effect of the waiver on competition and market concentration;

(11) In the case of a nonprofit educational institution, the extent to which such institution has a technology transfer capability and program approved by the Head of the Agency or designee as being consistent with the applicable policies of this section; and

(12) The small business status of the contractor.

(d) Procedures.

(1) All waiver determinations shall be initiated by a written request providing the information set forth in paragraph (e). Such requests may be submitted by existing or potential contractors in the case of requests for an advance waiver and by contractors or employee-inventors in the case of requests for waiver for identified inventions. A request for an advance waiver may also be made for an identified invention which has already been conceived and which reasonably may be first actually reduced to practice in the course of or under a DOE contract. Such waiver requests must include a copy of the patent or patent application covering the identified invention.

(2) A request for an advance waiver shall be submitted to the Contracting Officer or to contractors for their subcontractors at any time prior to execution of the contract or within thirty days thereafter, but should normally be submitted as part of the contract proposal. If the purpose, scope, or cost of the contract is substantially altered by modification or extension, a new waiver request will be required. Accordingly, in such instance, Patent Counsel should advise the Contracting Officer if the purpose, scope, cost, or other factors are so changed upon which the original waiver was granted as to require submission and approval of a new waiver request covering the proposed modification or extension. When advance waivers are granted, the rights set forth in paragraphs (b), (c) and (d) of the clause of §9-9.107-5(a) should be modified to conform to the waiver granted.

(3) A request for waiver (other than advance waivers) for an identified invention shall be submitted to the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) at the time the invention is reported to DOE, or not later than nine months after conception or first actual reduction to practice, whichever occurs first, or such longer period as may be authorized by the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) for good cause shown in writing by the contractor or inventor.

(4) All requests for waiver received by DOE or its contractors will be forwarded promptly to the Patent Counsel assisting the procuring activity, together with any reference or supporting documents provided by the requestor and any documents or comments provided by the staff of the activity. If the request for waiver appears to contain insufficient information, the Patent Counsel may seek additional information from the requestor to supplement the request and may also seek additional information from other sources. The Patent Counsel will thoroughly analyze the request in view of each of the objectives and considerations set forth in this §9-9.109-6 and shall also consider the overall rights obtained by the Government in the patent, copyright, and data clauses of the contract. Where it appears that a lesser part of the rights of the United States than requested would be more appropriate in view of the policies set forth in this §9-9.109-6, the Patent Counsel should attempt to negotiate a compromise acceptable to both the requestor and DOE.

(5) The Patent Counsel will prepare and recommend a statement of considerations setting forth the rationale for either accepting or rejecting the waiver request. While the statement need not make specific findings as to each and every consideration of paragraph (b) or (c) of this section, it will cover those that raise significant issues and those that are decisive, and it will explain the basis for the recommmended determination. There may be occasions when the application of the various considerations in (b) or (c) of this section to a particular case could cause conflicting results, and in those instances the differences will be reconciled giving due regard to the overall policies set forth in this §9-9.109-6. Field Patent Counsel will coordinate actions on advance waivers with the Chief Counsel of the field procuring activity concerned as required by local procedures.

(6) The statement shall be forwarded to the Assistant General Counsel for Patents to serve as a recommended basis for the waiver determination. The Assistant General Counsel for Patents will also obtain comments from the appropriate DOE program organization to assist the Head of the Agency or designee in the waiver determination. In situations where time does not permit a delay in contract negotiations for the preparation and mailing of a full written statement, field Patent Counsel may submit a recommendation on the waiver verbally to the Assistant General Counsel for Patents and request a verbal determination from the Head of the Agency or designee. Such action shall be promptly confirmed in writing.

(7) In making waiver determinations, the Head of the Agency or designee shall objectively review all requests for waiver in view of the objectives and considerations set forth in this §9-9.109-6. If this determination and the rationale therefor is not accurately reflected in the recommended statement of considerations, a new statement shall be prepared.

(8) Where the request for advance waiver has not been approved prior to the effective date of the contract and the terms and conditions of the waiver have thus not been made a part of the contract, the Contracting Officer shall promptly notify the requestor by letter of the determination of the Head of the Agency or designee, and the basis therefor. If the advance waiver is approved, the letter shall state the scope, terms, and conditions of such waiver. Where the terms and conditions of an approved advance waiver have not been made a part of the contract, the letter shall inform the requestor that the advance waiver shall be effective (i) as of the effective date of the contract for an advance waiver of inventions identified, i.e., conceived prior to the effective date of the contract, or (ii) as of the date the invention is reported with an election by the contractor to retain rights therein, i.e., for an invention conceived or first actually reduced to practice after the effective date of the contract; provided a copy of

the letter is signed and returned to the Contracting Officer by the requestor acknowledging the acceptance of the scope, terms and conditions of the advance waiver. After acceptance by the contractor of an advance waiver, the Contracting Officer shall cause a unilateral no-cost modification to be made to the contract incorporating the terms and conditions of the waiver in lieu of previous patent provisions. Whenever a requested determination has been denied, the requestor may, within thirty days after notification of denial, request recondideration. Such a request shall include any additional facts and rationale not previously submitted which support the request. Requests for reconsideration shall be submitted and processed in accordance with the procedures set forth in this paragraph (d).

(e) Content of waiver requests.

(1) All requests for waiver shall include the following information (Forms for submitting requests for advance and identified waivers indicating the necessary information may be obtained from the Contracting Officer or Patent Counsel):

(i) The requestor's identification, business address, and, if represented by Counsel, the Counsel's name and address;

(ii) An identification of the pertinent contract or proposed contract and a copy of the contract statement of work or a nonproprietary statement which fully describes the proposed work to be performed;

(iii) The nature and extent of waiver requested;

(iv) A full and detailed statement of facts, to the extent known by or available to the requestor, directed to each of the considerations set forth in paragraph (b) or (c) of this section, as applicable, and a statement applying such facts and considerations to the policies set forth in paragraph (a) of this section. It is important that this submission be tailored to the unique aspects of each request for waiver, and be as complete as feasible; and

(v) The signature of the requestor or authorized representative with the following statement:

> The facts set forth in this request for waiver are within the knowledge of the requestor and are submitted with the intention that the Head of the Agency or designee rely on them in reaching the waiver determination.

(2) Requests for waiver, for identified inventions shall include, in addition to items (1)(i) to (v) above:

(i) The full names of all inventors;

(ii) A statement of whether a patent application has been filed on the invention, together with a copy of such application if filed or, if not filed, a complete description of the invention;

(iii) If a patent application has not been filed, any information which may indicate a potential statutory bar to the patenting of the invention under 35 USC 102 or a statement that no such bar is known to exist; and

(iv) Where the requestor is the inventor, written authorization from the applicable contractor or subcontractor permitting the inventor to request a waiver.

(3) Subject to DOE regulations, requirements, and restrictions on the treatment of proprietary and classified information, all material submitted in requests for waiver or in support thereof will be made available to the public after a determination on the waiver request has been made, regardless of whether a waiver is granted. Accordingly, requests for waiver should not contain information or data that the requestor is not willing to have made public. If proprietary or classified information is needed to make the waiver determination, such information shall not be submitted unless specifically requested by the Patent Counsel.

(f) Record of waiver determinations.

The Assistant General Counsel for Patents shall maintain and periodically update a publicly available record of waiver determinations.

(g) Waiver situations and types of waivers.

(1) The various factual situations which are appropriate for waivers cannot be categorized precisely inasmuch as the appropriateness of a waiver will depend upon the manner in which the considerations set forth in paragraph (b) or paragraph (c) of this section relate to the facts and circumstances surrounding the particular contracting situation or the particular invention in order to best achieve the objectives set forth in paragraph (a) of this section. However, some examples where waivers might be appropriate are in the following:

(i) Cost-sharing contracts;

(ii) Situations in which DOE is providing increased funding to a specific ongoing privately-sponsored research, development, or demonstration project;

(iii) Situations involving the private use of Government facilities where the contractor is funding all or a part of such costs;

(iv) Situations in which the equities of the contractor are so substantial in relation to that of the Government that the waiver is necessary to obtain the participation of the contractor; and

(v) Situations involving contracts with small business concerning their privately developed technology.

(2) As stated in paragraph (a) of this section, waivers may be granted as to all or any part of the rights of the United States to an invention except for certain rights as set forth in paragraph (i) in this section. Accordingly, the waiver of all patent rights that are inherent to an invention, rather than part of the rights, will not necessarily be appropriate. The scope of the waiver will depend upon the relationship of the contractual situation or identified invention to the considerations set forth in paragraph (b) or (c) in order to best achieve the objectives set forth in paragraph (a) of this section. For example, waivers may be restricted to a particular field of use in which the contractor has substantial equities or a commercial position, or restricted to those uses that are not the primary object of the contract effort. Waivers may also be limited to particular geographical locations, may be made effective only for a specified duration of time, or may require the contractor to license others at reduced royalties in consideration of the Government's contribution to the research, development, or demonstration effort.

(3) In advance waivers of identified inventions, the invention will be deemed to be a subject invention and the waiver will be considered as being effective as of the effective date of the contract. This will be true regardless of whether the identified invention had been first actually reduced to practice prior to the time of contracting or would be reduced to practice under the contract. A purpose of such waivers is to clarify and definitize the rights of the parties to such inventions when the facts surrounding the first actual reduction to practice prior to or during the contract are or will be difficult to establish.

(h) Waivers to educational institutions.

(1) Except to the extent that a nonprofit educational institution may be engaged as a contractor operating a Government-owned facility or undertaking other special contracts, the following considerations apply to granting of advance and identified waivers to educational institutions having an approved technology transfer program capability. To obtain approval of a technology transfer program, an educational institution shall forward its request to DOE as provided in paragraph (2) below.

(2) A nonprofit educational institution desiring to obtain approval of its technology transfer program and acceptability shall provide the agency with the following information:

(i) General information concerning the institution, including:

(A) A copy of its articles of incorporation;

(B) A statement of the institution's purpose and aims; and

(C) A statement indicating the source of the institution's funds.

(ii) A copy of the institution's established patent policy, together with the date and manner of its adoption;

(iii) The name, title, address, and telephone number of the officer responsible for administration of patent and invention matters and a description of staffing in this area, including all offices which contribute to the institution's patent management capabilities;

(iv) A description of the institution's procedures for identifying and reporting inventions and a description of the procedures for evaluation of such inventions for inclusion in the institution's promotional program;

(v) A copy of the agreement signed by employees engaged in research and development, indicating their obligation in regard to inventions conceived or first actually reduced to practice in the course of their assigned duties;

(vi) A copy of the invention report form or outlines utilized for preparation of invention reports;

(vii) A statement of whether the institution has an agreement with any patent management organizations or consultants and a copy of any such agreements;

(viii) A description of the plans and intentions of the institution to bring to the marketplace inventions to which it retains title, including a description of the efforts typically undertaken by the institution to license its inventions.

(ix) A description of the institution's past patent application and patent licensing activities, including the following:

(A) Number of inventions reported to the institution during each of the past 5 years;

(B) Number of patent applications filed during each of the past 5 years;

(C) Number of patents obtained during each of the past 5 years;

(D) Number of exclusive licenses issued during each of the past 5 years;

(E) Number of nonexclusive licenses, other than those to sponsoring Government agencies, issued during each of the past 5 years;

(F) Gross royalty income during each of the past 5 years; and

(G) A general description of royalties charged, including minimum and maximum royalty rates.

(x) A list of subsidiary or affiliate institutions which would be covered by an agreement signed by the institution;

(xi) If the institution is a subsidiary or affiliate organization, the name of the other related organization and a description of the relationship;

(xii) The amount of support from each Federal Agency for research and development activities currently being administered by the institution, giving Government agency and breakdown;

(xiii) A statement of the institution's policies with respect to the sharing of royalties with employees; and

(xiv) A description of the uses made of any net income generated by the institution's patent management program.

(3) Before an institution's technology transfer program and capabilities are approved, the institution shall have a technology transfer program which, as a minimum shall include the six criteria listed below. In addition to these criteria, consideration will be given to whether or not other Government agencies have approved an institutional patent agreement with the requesting institution. The six criteria are:

(i) An established patent policy which is consistent with the four policy objectives in §9-9.109-6(a) and is administered on a continuous basis by an officer or organization responsible to the institution;

(ii) Agreements with employees requiring them to assign to the institution or its designee or the Government any invention conceived or first actually reduced to practice by them in the course of or under Government contracts and awards, or assurance that such agreements are obtained prior to the assignment of personnel to Government-supported research and development projects;

(iii) Procedures for insuring that inventions are promptly identified and timely disclosed to the officer or organization administering the patent policy of the institution;

(iv) Procedures for insuring that inventions disclosed to the institution are evaluated for inclusion in the institution's promotional program; and

(v) An active and effective promotional program for the licensing and marketing of inventions.

(vi) The institution has a policy of preferring, in appropriate circumstances, nonexclusive over exclusive licensing and domestic over foreign manufacture.

(4) In connection with requests for advance waivers, an approved technology transfer program and capabilities shall be considered in lieu of commercial, manufacturing, and marketing capabilities which normally reside in industry. Such approval shall not be considered sufficient in and of itself as justifying the granting of an advance waiver to an institution. Approval of the grant of an advance waiver must be viewed in light of the considerations of §9-9.109-6(b) above and the four objectives set forth in §9-9.109-6(a) above.

(5) In requests for identified waivers, however, the fact that an institution with an approved technology transfer program and capabilities has identified an invention and has expressed a desire to commercialize it through a request for a waiver therefor shall normally constitute a presumption that the institution has met the criteria of §9-9.109-6(c) unless it is indicated that under one or more of the criteria the presumption is inapplicable.

(6) If, in addition to a DOE-approved technology transfer program, an educational institution has a written procedure whereby the institution reviews for patentable subject matter papers concerning scientific or technical developments, the following paragraph (g) may be substituted for paragraph (g) of the Patent Rights (short form) clause of §9-9.107-6 or other Patent Rights clause in the contract.

> (g) In order that information concerning scientific or technical developments conceived or first actually reduced to practice in the course of or under the contract is not prematurely published so as to adversely affect patent interest of DOE, the Contractor agrees to screen for patent review each paper prior to its intended publication date. If a Subject Invention is identified by the Contractor in a paper submitted for review, the paper will be submitted to Patent Counsel prior to publication. Publication may be delayed by Patent Counsel for such time as is necessary to file a patent application thereon, up to a maximum of 100 days from the date the paper was submitted to Patent Counsel, or for a period longer than 100 days as mutually agreed.

(i) Terms and conditions of waivers.

Each waiver shall contain, as a minimum, provisions covering each of the following:

(1) Advance waivers shall apply only to inventions reported with an election as to whether the contractor will retain the rights waived in the invention, and specifying those countries in which rights will be retained.

(2) Subject to the rights granted in paragraphs (c)(1), (2) and (3) of the Patent Rights clause of §9-9.107-5(a), the contractor or inventor shall agree to convey to the Government, upon request, the entire domestic right, title, and interest in any subject invention when the contractor or inventor, as appropriate:

(i) Does not elect, in accordance with (i)(1) of this section to retain such rights; or

(ii) Fails to have a United States patent application filed on the invention in accordance with paragraph (i)(5) of this section, or decides not to continue prosecution of such application; or

(iii) At any time, no longer desires to retain title.

(3) Subject to the rights granted in paragraph (c)(1), (2) and (3) of the Patent Rights clause of §9-9.107-5(a), the contractor or inventor shall agree to convey to the Government, upon request, the entire right, title and interest in any subject invention in any foreign country, if the contractor or inventor, as appropriate:

(i) Does not elect, in accordance with paragraph (i)(1) of this section, to retain such rights in the country; or

(ii) Fails to have a patent application filed in the country on the invention in accordance with paragraph (i)(6) of this section, or decides not to continue prosecution or to pay any maintenance fees covering the invention. To avoid forfeitures of the patent application or patent, the contractor or inventor shall notify the Patent Counsel not less than 60 days before the expiration period for any action required by the Foreign Patent Office.

(4) Conveyances requested pursuant to paragraph (i)(2) or (3) of this section shall be made by delivering to the Patent Counsel duly executed instruments and such other papers as are deemed necessary to vest in the Government the entire right, title, and interest in the invention to enable the Government to apply for and prosecute patent applications covering the invention in this or the foreign country, respectively, or otherwise establish its ownership of the invention.

(5)(i) With respect to each invention in which the contractor has an advance waiver and elects to retain domestic rights pursuant to paragraph (i)(1) of this section, the contractor shall have a domestic patent application filed within 6 months after submission of the invention disclosure pursuant to paragraph (e)(2)(i) of the clause of § 9-9.107-5(a) or such longer period as may be approved by the Patent Counsel for good cause shown in writing by the contractor or inventor. For identified inventions waived to the contractor or inventor, the contractor or inventor shall have a domestic patent application filed within 6 months after the waiver has become effective or such longer period as may be approved by the Patent Counsel for good cause in writing by the contractor or inventor. With respect to such inventions, the contractor or inventor shall promptly notify the Patent Counsel of any decision not to file an application.

(ii) For each subject invention on which a patent application is filed by the contractor or inventor, the contractor or inventor shall:

(A) Within 2 months after the filing or within 2 months after submission of the invention disclosure if the patent application previously has been filed, deliver to Patent Counsel a copy of the application as filed including the filing date and serial number;

(B) Include the following statement in the second paragraph of the specification of the application and any patents issued on a subject invention, "The Government has rights in this invention pursuant to Contract No. _________ (or Grant No. _________) awarded by the U.S. Department of Energy;"

(C) Within 6 months after filing the application or within 6 months after submitting the invention disclosure if the application has been filed previously, deliver to the Patent Counsel a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled, and provide DOE an irrevocable power to inspect and make copies of the patent application filed. If, however, a waiver request is pending, delivery of the confirmatory instrument may be delayed until a determination of the waiver request is made;

(D) Provide the Patent Counsel with a copy of the patent within 2 months after a patent is issued on the application; and

(E) Not less than 30 days before the expiration of the response period for any action required by the Patent and Trademark Office, notify the Patent Counsel of any decision not to continue prosecution of the application and deliver to the Patent Counsel executed instruments granting the Government a power of attorney.

(iii) For each invention in which the contractor initially elects pursuant to (i)(1) of this section not to retain the rights waived, the contractor shall inform the Patent Counsel promptly in writing of the date and identity of any on sale, public use, or public disclosure of the invention which may constitute a statutory bar under 35 U.S.C. 102, which was authorized by or known to the contractor, or any contemplated action of this nature.

(6)(i) With respect to each invention in which the contractor elects pursuant to (i)(1) of this section to retain the rights waived in a foreign country, or in which the contractor or inventor has obtained a waiver of foreign rights on an identified invention, the contractor or inventor shall have a patent application filed on the invention in that country, in accordance with applicable statutes and regulations, and within one of the following periods:

(A) Eight months from the date of a corresponding United States application filed by the contractor or inventor, or if such an application is not filed, 6 months from the date the invention is submitted in a disclosure pursuant to paragraph (e)(2)(i) of the clause of §9-9.107-5(a);

(B) Six months from the date a license is granted by the Commissioner of Patents and Trademarks to file foreign applications where such filing has been prohibited by security reasons; or

(C) Such longer period as may be approved by the Patent Counsel.

(ii) The contractor or inventor shall notify the Patent Counsel promptly of each foreign application filed and, upon written request, shall furnish an English version of the application without additional compensation.

(7) The contractor or inventor shall, three years after a waiver is effective as to an invention, and at three-year intervals thereafter for the life of the patent, and when specifically requested by the Patent Counsel, furnish Patent Counsel a report setting forth:

(i) The commercial use that is being made, or is intended to be made, of said invention, and

(ii) The steps taken to bring the invention to the point of practical application or to make the invention available for licensing.

(8) The Government shall retain at least an irrevocable, nonexclusive, paid-up license to make, use, and sell the invention throughout the world by or on behalf of the Government (including any Government agency) and States and domestic municipal governments, unless the Head of the Agency or designee determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments.

(9) The Head of the Agency or designee has the right to require the granting of a nonexclusive, exclusive, or partially exclusive license to a responsible applicant or applicants, upon terms reasonable under the circumstances:

(i) To the extent that the invention is required for public use by Governmental regulations;

(ii) As may be necessary to fulfill health, safety or energy needs; or

(iii) Such other purposes as may be stipulated in the applicable agreement.

(10) The Head of the Agency or designee has the right to terminate such waiver in whole or in part unless the recipient of such waiver demonstrates to the satisfaction of the Head of the Agency or designee that effective steps have been taken, or within a reasonable time thereafter are expected to be taken, necessary to accomplish substantial utilization of the invention.

(11) The Head of the Agency or designee has the right, commencing four years after a waiver is effective as to an invention, to require the granting of a nonexclusive or partially exclusive license to a responsible applicant or applicants, upon terms reasonable under the circumstances, and in appropriate circumstances to terminate the waiver in whole or in part, following a hearing upon notice thereof to the public, upon a petition by an interested person justifying such hearing;

(i) If the Head of the Agency or designee determines upon review of such material as is relevant, and after the recipient of the waiver or other interested person has had the opportunity to provide such relevant and material information as the Head of the Agency or designee may require, that such waiver has tended substantially to lessen competition or to result in undue market concentration in any section of the United States in any line of commerce to which the technology relates; or

(ii) The recipient of the waiver demonstrates to the satisfaction of the Head of the Agency or designee at such hearing that effective steps have been taken, or within a reasonable time thereafter are expected to be taken, necessary to accomplish substantial utilization of the invention.

(j) Termination.

(1) Any waiver may be terminated at the discretion of the Head of the Agency or designee, in whole or in part, if the request for waiver is found to contain false material statements or nondisclosure of material facts, and such were specifically relied upon in reaching the waiver determination.

(2) Any waiver, as applied to particular inventions, may be terminated at the discretion of the Head of the Agency or designee, in whole or in part, if the requirements set forth in paragraph (i) of this section (terms and conditions of the waivers) have not been fulfilled and such failure is determined by the Head of the Agency or designee to be material and detrimental to the interests of the United States and the general public.

(3) Prior to terminating a waiver under paragraph (j)(1) or (j)(2) of this section, the recipient of the waiver will be given written notice of the intention to terminate the waiver, the extent of such proposed termination and the reason therefor, and a period of 30 days, or such longer period as the Head of the Agency or designee shall determine for good cause shown in writing, to show cause why the waiver should not be so terminated.

(4) All terminations of waivers shall be subject to the rights granted in paragraph (c)(1) of the clause of §9-9.107-5(f), and termination shall normally be partial in nature, requiring the waiver recipient to grant nonexclusive or partially nonexclusive licenses to responsible applicants upon terms reasonable under the circumstances.

(k) Effective date.

Waivers shall be effective on the following dates:

(1) For advance waivers of identified inventions, i.e., inventions conceived prior to the effective date of the contract, on the effective date of the contract, even though the advance waiver may have been requested after that date;

(2) For identified inventions under advance waivers, i.e., inventions conceived or first actually reduced to practice after the effective date of the contract, on the date the invention is reported with the election to retain rights as to that invention; and

(3) For waivers of identified inventions (other than under an advance waiver), on the date of the letter notifying the requestor that the waiver has been granted.

OMB Control No.: 1901—0021; 1901—0246, paragraphs (c)(7), (i)(5)(iii), and (i)(6)(ii).

§9-9.110 Reporting of royalties.

In order that DOE may be informed regarding royalty payments to be made by a contractor in connection with any procurement, construction, or operation where the amount of the royalty payment is reflected in the contract price, or is to be reimbursed by the Government, the negotiator shall:

(a) Obtain from the offeror information concerning any royalty payments expected to be made in connection with the proposed procurement, construction, or operation, together with the names of the licensors and either the patent numbers involved or such other information as will permit identification of the patents and patent applications as well as the basis on which the royalties are to be paid;

(b) Obtain from the offeror a certificate that the contract price includes no amount representing the payment of royalty by the offeror directly to others in connection with the performance of the contract; or

(c) Insert in the contract the clause set forth below:

REPORTING OF ROYALTIES

> If this contract is in an amount which exceeds $10,000 and if any royalty payments are directly involved in the contract or are reflected in the contract price to the Government, the contractor agrees to report in writing to the Patent Counsel (with notification by Patent Counsel to the Contracting Officer) during the performance of this contract and prior to its completion or final settlement, the amount of any royalties or other payments paid or to be paid by it directly to others in connection with the performance of this contract together with the names and addresses of licensors to whom such payments are made and either the patent numbers involved or such other information as will permit the identification of the patents or other basis on which the royalties are to be paid. The approval of DOE of any individual payments or royalties shall not stop the Government at any time from contesting the enforceability, validity or scope of, or title to, any patent under which a royalty or payments are made.

OMB Control No.: 1901—0021.

Subpart 9-9.2 Technical Data and Copyrights

§9-9.200 Scope of subpart.

This subpart sets forth DOE's policy, procedures, and contract clauses with respect to the acquisition and use of technical data and copyrights in contracts or subcontracts entered into, with or for the benefit of the Government.

§9-9.201 Definitions.

For the purpose of this subpart, the following terms have the meanings set forth below:

(a) "Technical data" means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, demonstration, or engineering work or be usable or used to define a design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents, or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data, as used in this subpart, do not include financial reports, cost analyses, and other information incidental to contract administration.

(b) "Proprietary data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(1) Are not generally known or available from other sources without obligation concerning their confidentiality;

(2) Have not been made available by the owner to others without obligation concerning their confidentiality; and

(3) Are not already available to the Government without obligation concerning their confidentiality.

(c) "Contract data" means technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, technical data that may be called for under the Additional Technical Data Requirements clause of the contract, if any, or technical data actually delivered in connection with the contract.

(d) "Unlimited rights" means rights to use, duplicate or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

§9-9.202 Acquisition and use of technical data.

§9-9.202-1 General.

(a) The provisions herein pertain to research, development, demonstration and supply contracts, and contracts for the operation, design, or construction of Government-owned facilities which are covered by §9-9.202-4. Under DOE's broad charter to perform research, development, and demonstration work, in both nuclear and nonnuclear fields, and to meet the objectives stated in §9-9.202-2 below, DOE has extensive needs for technical data. The satisfaction of these needs and the achievement of DOE's objectives through a sound data policy are found in the balancing of the needs and equities of the Government, its contractors, and the general public.

(b) It is important to keep a clear distinction between contract requirements for the delivery of technical data on the one hand, and rights in technical data on the other. The legal rights which the Government acquires in technical data in DOE contracts (other than "facilities" contracts) are set forth in the Rights in Technical Data (long form) clause of §9-9.202-3(e)(2). However, this clause does not obtain for the Government the delivery of any data whatsoever. Rather, known requirements for the technical data to be delivered by the contractor shall be set forth as part of the contract (e.g. in the statement of work). An Additional Technical Data Requirements clause is included in this subpart to enable the Contracting Officer to require the contractor to furnish additional technical data, the requirement for which was not known at the time of contracting. There is, however, a built-in limitation on the kind of technical data which a contractor may be required to deliver under either the contract statement of work or the Additional Technical Data Requirements clause. This limitation is found in the withholding provision of paragraph (e) of the Rights in Technical Data (long form) clause of §9-9.203-3(e)(2) which provides that the contractor need not furnish "proprietary data." It is specifically intended that the contractor may withhold "proprietary data" even though a requirement for technical data specified in the statement of work or called for pursuant to the Additional Technical Data Requirements clause would seemingly require the furnishing of proprietary data. This withholding of proprietary data is the primary means by which the contractor may protect its proprietary position.

(c) There are, however, two situations where the Government, or its representative, may need to have limited access to a contractor's proprietary data. First, paragraph (f) of the Rights in Technical Data (long form) clause gives the Contracting Officer's representatives the limited right to inspect at the contractor's facility the contractor's proprietary data which were withheld from delivery under paragraph (e) of the clause for the purpose of verifying that such data were properly withheld or to evaluate work performance. In carrying out the inspection, normally the Contracting Officer's representative is a DOE employee although he may be an employee of a DOE contractor acting under an agreement to treat in confidence the proprietary data to be inspected. However, where the contractor whose data are to be inspected demonstrates that there would be a possible conflict of interest if the inspection were made by such a contractor employee, the Contracting Officer's representative may be limited to a DOE employee. Paragraph (f) has a built-in exclusion from these inspection rights for "specific items of proprietary data" when they are so specified in the contract schedule. Such exclusions limit even DOE's minimum rights of evaluating contract work performance and verifying that technical data withheld by the contractor is proprietary in fact. Such exclusions should be sparingly used, and only in situations where program personnel stipulate to the fact that DOE has no need for access to the specified items to be excluded from paragraph (f), i.e., that the nondisclosure and nonaccessibility will not adversely affect the DOE program involved. It should also be noted that paragraph (f) permits exclusion of "specific items" of proprietary data and, accordingly, should not be used to exclude classes of technical data or all technical data pertaining to specific items or processes or classes of items or processes. The second situation, where the Government may have limited access to a contractor's proprietary data, is provided in optional paragraph (g) of the Rights in Technical Data (long form) clause. When used, optional paragraph (g) provides the Government the right to require the contractor to furnish with limited rights the proprietary data previously withheld under paragraph (e). In this situation, the limited rights in proprietary data and the Government's obligation for limited use and disclosure of such data as set forth in the Rights in Technical Data (long form) clause provides the means by which the contractor protects its proprietary position. Paragraph (g) will be used only where it is determined by DOE that for programmatic reasons there is a need for the delivery of proprietary data to the Government. Where proprietary data is to be delivered under paragraph (g) and subparagraph (a) or (b) of the limited rights legend is to be applied to the data, the contractor may, if he can show the possibility of a conflict of interest regarding disclosure of such data to other contractors, limit or modify subparagraphs (a) or (b) as set forth in §9-9.202-3(e)(3), to exclude or include certain contractors.

(d) The contractor licensing provisions of optional paragraph (h) of the Rights in Technical Data (long form) clause enable DOE to require limited licenses in proprietary contract data to be granted to the Government and responsible parties in certain circumstances. Such a license may parallel or supplement the license obtained in background patents under the provisions of paragraph (k) of the Patent Rights clause of Subpart 9-9.1. Paragraph (h) is normally to be included in contracts for research, development or demonstration where it is deemed by DOE that the limited license afforded therein is necessary to ensure widespread commercial use or practical utilization of a subject of the contract. As explained in §9-9.202-3(e)(4), paragraph (h) provides that upon request by DOE, the contractor will grant to the Government and responsible third parties a license in proprietary data only where such data in the form of results obtained by its use, i.e., essential equipment, articles, products, and the like which were the subject of the contract, are not otherwise available, or cannot be made available in a reasonable time as set forth in paragraph (h).

(e) It is the responsibility of prime contractors and highertier subcontractors, in meeting their obligations with respect to contract data, to obtain from their subcontractors the rights in, access to, and delivery of such data on behalf of the Government. Accordingly, subject to the policy set forth in these regulations, and subject to the approval of the Contracting Officer where required, selection of appropriate technical data provisions for subcontracts is the responsibility of the prime contractor or higher-tier subcontractor. In many but not all instances, inclusion in a subcontract of the Rights in Technical Data (long form) clause of §9-9.202-3(e)(2) will suffice to obtain for the benefit of the Government the rights in and, if appropriate, access to technical data. Access by DOE to technical data, i.e., the inspection rights afforded in paragraph (f) of the Rights in Technical Data (long form) clause, §9-9.202-3(e)(2), normally should be obtained only in first-tier subcontracts having as a purpose the conduct of research, development, or demonstration work or the furnishing of supplies for which there are substantial technical data requirements as reflected in the prime contract. If a subcontractor refuses to accept technical data provisions affording rights in and access to technical data on behalf of the Government, the contractor shall so inform the Contracting Officer in writing and not proceed with the subcontract without written authorization of the Contracting Officer. In prime contracts (or higher-tier subcontracts) which contain the Additional Technical Data Requirements clause, it is the further responsibility of the contractor (or higher-tier subcontractor) to determine whether inclusion of such clause in a subcontract is required to satisfy technical data requirements of the prime contract (or higher-tier subcontract). As is the case for DOE in its determination of technical data requirements, the Additional Technical Data Requirements clause should not be used at any subcontracting tier where the technical data requirements are fully known, and normally the clause will be used only in subcontracts having as a purpose the conduct of research, development, or demonstration. Prime contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to inequitably acquire rights in the subcontractor's proprietary data for their private use, and they shall not acquire rights on behalf of the Government to proprietary data for standard commercial items unless required by the prime contract.

(f) Related to the acquisition and use of technical data are the contractor's rights in contract data as well as technical data furnished to the contractor by DOE or its contractors. These rights are set forth in paragraph (b)(2) of each Rights in Technical Data clause of this subpart and provide that the contractor may, subject to patent, security and other provisions of the contract, use for its private purposes contract data it first produces in the performance of the contract, provided that the contractor has met its data requirements (e.g., delivery of data in the form of progress or status reports specified to be delivered) as of the date of the private use of such data. It is not necessary that a final report be submitted in order to privately use data if all required progress and interim reports and other technical data then due have been delivered. Paragraph (b)(2) further provides that technical or other data received by the contractor in the performance of the contract must be held in confidence by the contractor in accordance with restrictions accompanying the data.

(g) An additional clause in this subpart includes that of paragraph §9-9.202-3(f)(2) entitled Rights in Data - Special Works, which is to be used in place of or in addition to the Rights in Technical Data (long form) clause in contracts where a purpose of the contract is the production of copyrightable material, a substantial portion of which is to be first produced in the performance of the contract, such as motion pictures, television recordings, books, histories, etc. Where, during contract negotiations, it may be determined to purchase, i.e., "specifically acquire," unlimited rights in technical data, or to lease or obtain a license therein, or to obtain rights in existing data, an appropriate clause therefor should be obtained from Patent Counsel. In situations where technical data including computer software are to be leased or licensed, the terms of any agreement restricting the Government's rights will be included in the contract as either a special provision or an agreement annexed thereto. Another clause, the Rights in Technical Data (short form) clause of §9-9.202-3(g)(2), is provided for use in research contracts with educational institutions and consultants. Such contracts may, for example, include those for conducting symposia, training, or education, or other contracts not involving possible use of proprietary data.

(h) In contracts involving access to certain categories of DOE-owned restricted data, as set forth in 10 CFR Part 725, DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related data and technology. Accordingly, in contracts where access to such restricted data is to be provided to contractors, the following parenthetical phrase shall be inserted after "contract data" in paragraph (b)(2)(ii) of the clause in §9-9.202-3(e)(2), after "technical data" in paragraph (b)(2) of the clause in §9-9.202-3(g)(2), or after "technical data" in paragraph (b)(2)(ii) of the clause in §9-9.202-4(c)(2) as appropriate: (except Restricted Data in category C-24, 10 CFR 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology). In addition, there are other types of contract situations (e.g., no cost contracts for studies or evaluation) wherein the contractor is given access to restricted data. In such contract situations, limitations on the use of such data may be appropriate.

§9-9.202-2 Policy.

The technical data policy is directed toward achieving the following objectives:

(a) Making the benefits of the energy research, development and demonstration programs of DOE widely available to the public in the shortest practicable time;

(b) Promoting the commercial utilization of the technology developed under DOE programs;

(c) Encouraging participation by private persons in DOE energy research, development, and demonstration programs; and

(d) Fostering competition and preventing undue market concentration or the creation or maintenance of other situations inconsistent with the antitrust laws.

§9-9.202-3 Procedures (supply, research, development, or demonstration contracts).

(a) Known requirements for technical data. Technical data requirements are determined in relation to the intended use of the data which in turn depends upon the intended use of the contract end item. In many contracts for research, the end item may often be a technical report or series of such reports, while in contracts beyond research, the subject of the contract may be a feasibility model, an engineering or advance development model, or a prototype. The extent to which required technical data may be needed often depends on the level of maturity of design and perfection of the end item, and, for a demonstration plant or prototype, may include data pertaining to performance, operational and environmental testing, repair, maintenance, operation, quality assurance, detailed design, logistics, training, etc. Known technical data requirements shall be programmatically ascertained prior to contracting and shall be included in requests for proposals or disclosed during contract negotiations for incorporation as data requirements in the contract statement of work.

(b) Additional requirements for technical data. In contracts for research, development, or demonstration, it is not normally possible or appropriate for the Government to ascertain all actual needs for technical data in advance of contracting. Accordingly, the Additional Technical Data Requirements clause in (c) below, shall normally be used in such contracts (and, if appropriate, in subcontracts) to enable the ordering of technical data as the actual need and requirement therefor became known during the course of the contract. If all technical data requirements are known in advance of contracting and are set forth in the contract statement of work, this clause need not be used. The Additional Technical Data Requirements clause should not normally be used in supply contracts because the required technical data therefor are ordinarily known in advance and thus are specified in the contract statement of work or specification.

(c) Additional Technical Data Requirements clause.

ADDITIONAL TECHNICAL DATA REQUIREMENTS

(a) In addition to the technical data specified elsewhere in this contract to be delivered, the Contracting Officer may at any time during the contract performance or within one year after final payment call for the contractor to deliver any technical data first produced or specifically used in the performance of this contract, except technical data pertaining to items of standard commercial design.

(b) The provisions of the Rights in Technical Data clause included in this contract are applicable to all technical data called for under this Additional Technical Data Requirements clause. Accordingly, nothing contained in this clause shall require the contractor to actually deliver any technical data, the delivery of which is excused by paragraph (e) of the Rights in Technical Data clause.

(c) When technical data are to be delivered under this clause, the contractor will be compensated for appropriate costs for converting such data into the prescribed form for reproduction, and for delivery.

(d) Proposals.

The policy and procedures for treatment of proposal information in solicited and unsolicited proposals are contained in §9-3.150 of these regulations in which it is provided that proposals may be marked with the notice set forth in §9-3.150-2(a). It is DOE policy, in consideration of the contract award, to obtain unlimited rights in the technical data contained in the proposal unless the prospective contractor marks those portions of the technical information which he asserts as being proprietary data. If a contract is to be awarded based on a proposal even though it is marked with the notice in §9-3.150-2(a), the prospective contractor is obliged under §9-3.150-2 (b) to identify the portions thereof which contain proprietary data, and the contract in such instance shall contain the Rights to Proposal Data clause set forth in §9-3.150-2(c) identifying data asserted to be proprietary data by page number. Under §9-3.150-2(b) and §9-3.151-1 which set forth procedures for identifying proprietary data, it is provided that, subject to the concurrence of the Contracting Officer, the proposer may delete proposal information unrelated to the contract, identify the proprietary data in his proposal, or state that there is no proprietary data in the proposal. Data identified as proprietary does not constitute a stipulation by the Government that it is in fact proprietary data.

(e) Rights in technical data.

(1) The Rights in Technical Data (long form) clause set forth in paragraph (2) below will be used in all contracts having as a purpose the conduct of research, development, or demonstration, or in contracts for supplies, or in any other contract where technical data are expected to be first produced under the contract, where technical data are specified to be delivered in the contract, or where the contract contains the Additional Technical Data Requirements clause. Accordingly, all such contracts will contain the Rights in Technical Data (long form) clause of paragraph (2) below, except as noted in §9-9.202-4 and §9-9.202-3(f) and (g) and

except contracts for standard commercial off-the-shelf supplies where technical data such as operating or repair manuals are routinely furnished with the supplies.

(2) Rights in Technical Data clause.

RIGHTS IN TECHNICAL DATA - LONG FORM

(a) Definitions.

(1) "Technical data" means recorded information regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design-type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein do not include financial reports, cost analyses, and other information incidental to contract administration.

(2) "Proprietary data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(i) Are not generally known or available from other sources without obligation concerning their confidentiality;

(ii) Have not been made available by the owner to others without obligation concerning its confidentiality; and

(iii) Are not already available to the Government without obligation concerning their confidentiality.

(3) "Contract data" means technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, technical data that may be called for under the Additional Technical Data Requirements clause of the contract, if any, or technical data actually delivered in connection with the contract.

(4) "Unlimited rights" means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

(b) Allocation of rights.

(1) The Government shall have:

(i) Unlimited rights in contract data except as otherwise provided below with respect to proprietary data;

(ii) The right to remove, cancel, correct or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if in response to a written inquiry by DOE concerning the propriety of the markings, the contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case, DOE will notify the contractor of the action taken;

(iii) No rights under this contract in any technical data which are not contract data.

(2) The contractor shall have:

(i) The right to withhold proprietary data in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this contract, contract data it first produces in the performance of this contract, provided the data requirements of this contract have been met as of the date of the private use of such data. The contractor agrees that to the extent it receives or is given access to proprietary data or other technical, business or financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, the contractor shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the Contracting Officer.

(3) Nothing contained in this Rights in Technical Data clause shall imply a license to the Government under any patent or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(c) Copyrighted material.

(1) The contractor shall not, without prior written authorization of the Patent Counsel with notification to the Contracting Officer, establish a claim to statutory copyright in any contract data first produced in the performance of the contract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf a royalty-free, nonexclusive, irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit and perform any such data copyrighted by the contractor.

(2) The contractor agrees not to include in the technical data delivered under the contract any material copyrighted by the contractor and not to knowingly include any material copyrighted by others, without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (c)(1) above. If such royalty-free license is unavailable and the contractor nevertheless determines that such copyrighted material must be included in the technical data to be delivered, rather than merely incorporated therein by reference, the contractor shall obtain the written authorization of the Contracting Officer to include such copyrighted material in the technical data prior to its delivery.

(d) Subcontracting.

It is the responsibility of the contractor to obtain from its subcontractors technical data and rights therein, on behalf of the Government, necessary to fulfill the contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the contractor shall:

(1) Promptly submit written notice to the Contracting Officer setting forth reasons for the subcontractor refusal and other pertinent information which may expedite disposition of the matter; and

(2) Not proceed with the subcontract without the written authorization of the Contracting Officer.

(e) Withholding of proprietary data.

Notwithstanding the inclusion of the Additional Technical Data Requirements clause in this contract or any provision of this contract specifying the delivery of technical data, the contractor may withhold proprietary data from delivery, provided that the contractor furnishes in lieu of any such proprietary data so withheld technical data disclosing the source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements ("Form, Fit and Function" data, e.g., specification control drawings, catalog sheets, envelope drawings, etc.), or a general description of such proprietary data where "Form, Fit and Function" data are not applicable. The Government shall acquire no rights to any proprietary data so withheld except that such data shall be subject to the "inspection rights" provisions of paragraph (f), and, if included, the "Limited rights in proprietary data" provisions of paragraph (g) and the "Contractor licensing" provisions of paragraph (h).

(f) Inspection rights.

Except as may be otherwise specified in this contract for specific items of proprietary data which are not subject to this paragraph, the Contracting Officer's representatives, at all reasonable times up to three years after final payment under this contract, may inspect at the contractor's facility any proprietary data withheld under paragraph (e) for the purposes of verifying that such data properly fell within the withholding provision of paragraph (e) and not furnished under paragraph (g) for the purposes of verifying that such data properly fell within the withholding provision of paragraph (e), or for evaluating work performance.

(3) Optional clause – Limited Rights in Proprietary Data.

In research, development, or demonstration contracts, and supply contracts where it is determined that delivery of proprietary data is necessary with limited rights in the Government, the Rights in Technical Data (long form) clause shall be supplemented by the additional paragraph (g) set forth below. It should be noted that this paragraph does not entitle the contractor to place a limited rights legend on any technical data furnished to the Government under paragraph (g) below unless the Contracting Officer requests in writing delivery of identified technical data previously withheld under paragraph (e) of the Rights in Technical Data clause. Paragraph (g) provides that proprietary data may be specified in the contract as being excluded from the delivery requirements of paragraph (e). Alternatively, the limited rights legend specified in paragraph (g) may be made applicable to only those classes of proprietary data determined as being necessary for delivery with limited rights. In addition, when furnishing proprietary data with the limited rights legend, subparagraphs (a), (b) and (c) thereunder may be modified as follows. When proprietary data is to be furnished only for evaluation, subparagraph (a) of the limited rights legend shall be used, and subparagraphs (b) and (c), if otherwise inapplicable, may be deleted. When there is a programmatic requirement that proprietary data be disclosed to other DOE contractors only for information or use in connection with work performed under their contracts, subparagraph (b) of the limited rights legend shall be used, and subparagraphs (a) and (c) may be deleted if otherwise inapplicable. In either of the foregoing examples, the contractor may, if he can show the possibility of a conflict of interest because of disclosure of such data to certain contractors or evaluators, exclude such contractors or evaluators from subparagraphs (a) or (b). If the data is required solely for emergency repair or overhaul, subparagraph (c) of the limited rights legend shall be retained, and subparagraphs (a) and (b) may be deleted, unless otherwise applicable. In the event it is determined that all of the subparagraphs (a), (b) and (c) of the limited rights legend are to be deleted, the word "none" shall be inserted in the legend after the colon (:).

(g) Limited rights in proprietary data.

Except as may be otherwise specified in this contract as technical data which are not subject to this paragraph, the contractor shall, upon written request from the Contracting Officer at any time prior to three years after final payment under this contract, promptly deliver to the Government any "proprietary data" withheld pursuant to paragraph (e) of the Rights in Technical Data clause of this contract. The following legend and no other is authorized to be affixed on any "proprietary data" delivered pursuant to this provision, provided the "proprietary data" meets the conditions for initial withholding under paragraph (e) of the Rights in Technical Data clause. The Government will thereafter treat the "proprietary data" in accordance with such legend.

LIMITED RIGHTS LEGEND

This technical data contains "proprietary data," furnished under "Contract No.___"with the U.S. Department of Energy (and Purchase Order No.___if applicable) which may be duplicated and used by the Government with the express limitations that the "proprietary data" may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the contractor, except that further disclosure or use may be made solely for the following purposes:

(a) This "proprietary data" may be disclosed for evaluation purposes under the restriction that the "proprietary data" be retained in confidence and not be further disclosed;

(b) This "proprietary data" may be disclosed to other contractors participating in the Government's program of which this contract is a part, for information or use in connection with the work performed under their contracts and under the restriction that the "proprietary data" be retained in confidence and not be further disclosed; or

(c) This "proprietary data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "proprietary data" be retained in confidence and not be further disclosed. This legend shall be marked on any reproduction of this data in whole or in part.

(4) Optional clause – Contractor Licensing.

In many contracting situations the achievement of DOE's objectives would be frustrated if the Government, at the time of contracting, did not obtain on behalf of responsible third parties and itself limited license rights in and to proprietary contract data. Where, for example, the contractor is required to license background patents, consideration should be given to securing co-extensive license rights to the Government and responsible third parties at reasonable royalties, and under appropriate restrictions, for contract data which are proprietary data in order to practice the technology which is a subject of the contract. When such a license right is deemed necessary, the Rights in Technical Data (long form) clause should be supplemented by the addition of paragraph (h) below. Paragraph (h) will normally be sufficient to cover proprietary contract data for items and processes that were used in the contract and are necessary in order to insure widespread commercial use of a subject of the contract. The expression "subject of the contract" is intended to limit the licensing required in clause (h) below to the fields of technology specifically contemplated in the contract effort and may be replaced by a more specific statement of the fields of technology intended to be covered in the manner described in §9-9.107-5(b)(9) of Subpart 9-9.1 of these Regulations pertaining to "Background Patents." Where, however, proprietary contract data cover the main purpose or basic technology of the research, development, or demonstration effort of the contract, rather than subcomponents, products or processes which are ancillary to the contract effort, the limitations set forth in subparagraphs (1)-(4) of paragraph (h) should be modified or deleted. Paragraph (h) further provides that technical data may be specified in the contract as being excluded from or not subject to the licensing requirements thereof. This exclusion can be implemented by limiting the applicability of the provisions of paragraph (h) to only those classes or categories of proprietary data determined as being essential for licensing. Although contractor licensing may be required under paragraph (h), the final resolution of questions regarding the scope of such licenses, the terms thereof, including provisions for confidentiality and reasonable royalties, is then left to the negotiation of the parties with resolution of the issues being made, if necessary, by a court of competent jurisdiction.

> (h) Contractor licensing.
>
> Except as may be otherwise specified in this contract as technical data not subject to this paragraph, the contractor agrees that upon written application by DOE, it will grant to the Government and responsible third parties, for purposes of practicing a subject of this contract, a nonexclusive license in any contract data which are proprietary data, on terms and conditions reasonable under the circumstances including appropriate provisions for confidentiality; provided, however, the contractor shall not be obligated to license any such data if the contractor demonstrates to the satisfaction of the Head of the Agency or designee that:
>
> (1) Such data are not essential to the manufacture or practice of hardware designed or fabricated, or processes developed, under this contract;
>
> (2) Such data, in the form of results obtained by their use, have a commercially competitive alternative available or readily introducible from one or more other sources;
>
> (3) Such data, in the form of results obtained by their use, are being supplied by the contractor or their licensees in sufficient quantity and at reasonable prices to satisfy market needs, or the contractor or their licensees have taken effective steps or within a reasonable time are expected to take effective steps to so supply such data in the form of results obtained by their use; or
>
> (4) Such data, in the form of results obtained by their use, can be furnished by another firm skilled in the art of manufacturing items or performing processes of the same general type and character necessary to achieve the contract results.

(f) Rights in data - special works.

(1) The clauses set forth in paragraph (2) below shall be used in all contracts where the principal purpose or a task of the contract is the production of copyrightable works, even though such works may incorporate uncopyrighted material or material previously copyrighted by the contractor or others. Such contracts include those:

(i) Primarily for production of motion picture or television recordings or scripts, musical compositions or arrangements, sound tracks or recordings, translations, adaptations, and the like;

(ii) For books, compilations, surveys, histories, or technology information pamphlets;

(iii) For works pertaining to management studies, support services, training, career guidance, or similar functions of DOE; and

(iv) For works pertaining to guidance or instruction of DOE officials or employees in the discharge of official duties.

(2) The Rights in Data - Special Works clause below should be modified with the assistance of Patent Counsel where the contract calls for the editing, translation, addition, or other modification of the subject matter of an existing work.

RIGHTS IN DATA - SPECIAL WORKS

(a) The term "Data" as used herein means recorded information regardless of form or characteristic, such as writings, sound recordings, pictorial reproductions, drawings, or other graphic representations, and works of similar nature (whether or not copyrighted) which are specified to be delivered under this contract. The term includes data such as management studies and data produced under support services contracts but does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) All data first produced or composed in the course of or under this contract shall be the sole property of the Government. Except with the prior written permission of the Contracting Officer, the contractor agrees not to assert any rights at common law or in equity or establish any claim to statutory copyright in such data. The contractor shall not publish or reproduce such data in whole or in part or in any manner or form, or authorize others so to do, without the written consent of the Contracting Officer or until such time as the Government may have released such data to the public.

(c) The contractor hereby grants to or will obtain for the Government a royalty-free, nonexclusive and irrevocable license throughout the world (1) to publish, translate, reproduce, deliver, perform, use, and dispose of, in any manner, any and all data which are not first produced or composed in the performance of this contract but which are incorporated in the work furnished under this contract; and (2) to authorize others so to do.

(d) The contractor shall indemnify and save and hold harmless the Government, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy, arising out of the publication, translation, reproduction, delivery, performance, use, or disposition of any data furnished under this contract; or (2) based upon any libelous, defamatory, or other unlawful matter contained in such data.

(e) Nothing contained in this clause shall imply a license to the Government under any patent, or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(g) Rights in Technical Data clause (short form).

(1) The clause set forth in paragraph (2) below may be used in contracts for basic research including grants, special research contracts with educational institutions, contracts with consultants, contracts for symposia, or for the conduct of training and educational programs, and in other contracts of a similar nature. This clause shall not be used in any contract where proprietary information of the contractor may be utilized in the performance of work under the contract; in such instances the Additional Technical Data Requirements clause of §9-9.202-3(c) and the Rights in Technical Data (long form) clause of §9-9.202-3(e)(2) shall be used. The short form clause of this section shall not be used in situations involving long-term consultancy arrangements for work in DOE programs providing opportunities for specialized work experience at DOE-owned facilities for scientific, engineering, and other employees of private firms and institutions engaged in civilian applications of atomic energy.

(2) Rights in Technical Data clause - short form.

RIGHTS IN TECHNICAL DATA - SHORT FORM

(a) Definitions.

The definitions of terms set forth in 41 CFR §9-9.201 apply to the extent these terms are used herein.

(b) Allocation of rights.

(1) The Government shall have:

(i) Unlimited rights in technical data first produced or specifically used in the performance of this contract;

(ii) The right of the Contracting Officer or his representatives to inspect at all reasonable times up to three years after final payment under this contract all technical data first produced or specifically used in the contract (for which inspection the contractor or its subcontractor shall afford proper facilities to DOE); and

(iii) The right to have any technical data first produced or specifically used in the performance of this contract delivered to the Government as the Contracting Officer may from time to time direct during the progress of the work, or in any event as the Contracting Officer shall direct upon completion or termination of this contract.

(2) The contractor shall have:

The right to use for its private purposes, subject to patent, security or other provisions of this contract, technical data it first produces in the performance of this contract provided the data requirements of this contract have been met as of the date of the private use of such data. The contractor agrees that to the extent it receives or is given access to proprietary data or other technical, business or financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, the contractor shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the Contracting Officer.

(c) Copyrighted material.

(1) The contractor agrees to, and does hereby grant to the Government, and to its officers, agents, servants and employees acting within the scope of their duties:

(i) A royalty-free, nonexclusive, irrevocable license to reproduce, translate, publish, use, and dispose of and to authorize others so to do, all copyrightable material first produced or composed in the performance of this contract by the contractor, its employees or any individual or concern specifically employed or assigned to originate and prepare such material; and

(ii) A license as aforesaid under any and all copyrighted or copyrightable works not first produced or composed by the contractor in the performance of this contract but which are incorporated in the material furnished under the contract, provided that such license shall be only to the extent the contractor now has, or prior to completion or final settlement of the contract may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

(2) The contractor agrees that it will not knowingly include any material copyrighted by others in any written or copyrightable material furnished or delivered under this contract without a license as provided for in subparagraph (1)(ii) hereof, or without the consent of the copyright owner, unless it obtains specific written approval of the Contracting Officer for the inclusion of such copyrighted material.

§9-9.202-4 Procedures (Government-owned facilities).

(a) General.

It is essential that DOE maintain continuity in its programs which are implemented by contracts for the operation of Government-owned facilities. Contract data first produced or specifically used in the performance of such contracts must be considered as integral to and remaining with the facility or plant after termination of such contracts and thus available to DOE and its future contractors for the continued use of the facility or plant. However, it is recognized that these contracts by their nature cannot always be subject to one set of prescribed contract provisions which will always apply. Accordingly, the Rights in Technical Data - Facility clause set forth in paragraph (c)(2) below is to be used as a basic or minimal clause which may be modified or expanded with the concurrence of Patent Counsel to meet particular contract situations.

(b) Subcontracting.

Unless otherwise directed by the Contracting Officer, the contractor shall follow the policy and procedures of §9-9.202-1, 2 and 3 above and shall employ the provisions of the Additional Technical Data Requirements clause of §9-9.202-3(c) and the Rights in Technical Data clause of §9-9.202-3(e)(2) where appropriate, except in subcontracts for the design of special production plants or facilities or specially designed equipment for such facilities or plants, in which instances contractors shall include the provisions of the Rights in Technical Data - Facility clause of §9-9.202-4(c)(2).

(c) Rights in technical data - facility.

(1) Whenever a contract has as a purpose the operation of a Government-owned research or production facility, the clause set forth in (2) below shall normally be included in the contract. Inasmuch as this clause secures to the Government ownership, access to, and, if requested, delivery of all technical data first produced in the performance of the contract and access to and delivery of technical data which are specifically used in the performance of the contract, there is no need to include the Additional Technical Data Requirements clause of §9-9.202-3(c).

(2) Rights in Technical Data clause - facility

RIGHTS IN TECHNICAL DATA - FACILITY

(a) Definitions.

(1) "Technical data" means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work or be usable or used to define a design or process or to procure, produce, support, maintain, or operate material. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents, or computer software (including computer programs, computer software data bases and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein does not include financial reports, cost analyses, and other information incidental to contract administration.

(2) "Proprietary data" means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(i) Are not generally known or available from other sources without obligation concerning their confidentiality;

(ii) Have not been made available by the owner to others without obligation concerning their confidentiality; and

(iii) Are not already available to the Government without obligation concerning their confidentiality.

(3) "Unlimited rights" means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

(b) Allocation of rights.

(1) The Government shall have:

(i) Ownership in all technical data first produced in the performance of the contract;

(ii) The right to inspect technical data first produced or specifically used in the performance of the contract at all reasonable times (for which inspection the proper facilities shall be afforded DOE by the contractor and its subcontractors);

(iii) The right to have all technical data first produced or specifically used in the performance of the contract delivered to the Government or otherwise disposed of by the contractor, either as the Contracting Officer may from time to time direct during the progress of the work or in any event as the Contracting Officer shall direct upon completion or termination of this contract, provided, that nothing contained in this paragraph shall require the contractor to actually deliver any technical data, the delivery of which is excused by this Rights in Technical Data clause;

(iv) Unlimited rights in technical data specifically used in the performance of this contract, except technical data pertaining to items of standard commercial design; the contractor agrees to leave a copy of such technical data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the Contracting Officer; provided, that if such data are proprietary, the rights of the Government in such data shall be governed solely by the provisions of optional paragraph (e) hereof— "Limited Rights in Proprietary Data;"

(v) The right to remove, cancel, correct, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the contractor of the action taken.

(2) The contractor shall have:

(i) The right to withhold its proprietary data in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this contract, technical data it first produces in the performance of this contract, provided the data requirements of this contract have been met as of the date of the private use of such data. The contractor agrees that to the extent it receives or is given access to proprietary data or other technical, business or financial data in the form of recorded information from DOE or a DOE contractor or subcontractor, the contractor shall treat such data in accordance with any restrictive legend contained thereon, unless use is specifically authorized by prior written approval of the Contracting Officer.

(3) Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(c) Copyrighted material

(1) The contractor shall not, without prior written authorization of the Patent Counsel with notification to the Contracting Officer, establish a claim to statutory copyright in any technical data first produced in the performance of this contract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf, a royalty-free, nonexclusive, irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, and perform any such data copyrighted by the contractor.

(2) The contractor agrees not to include in the technical data delivered under the contract any material copyrighted by the contractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (c)(1) above. If the contractor believes that such copyrighted material for which the license cannot be obtained must be included in the technical data to be delivered, rather than merely incorporated therein by reference, the contractor shall obtain the written authorization of the Contracting Officer to include such material in the technical data prior to its delivery.

(d) Subcontracting.

(1) Unless otherwise directed by the Contracting Officer, the contractor agrees to use in subcontracts having as a purpose the conduct of research, development, and demonstration work or in subcontracts for supplies, the contract clause

provisions in 41 CFR §9-9.202-3(c) and 41 CFR §9-9.202-3(e)(2) in accordance with the policy and procedures of 41 CFR §9-9.202-1, 2 and 3.

(2) It is the responsibility of the contractor to obtain from its subcontractors technical data and rights therein, on behalf of the Government, necessary to fulfill the contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the contractor shall:

(i) Promptly submit written notice to the Contracting Officer setting forth reasons for the subcontractor's refusal and other pertinent information which may expedite disposition of the matter; and

(ii) Not proceed with the subcontract without the written authorization of the Contracting Officer.

(d) Optional clause – Limited rights in proprietary data.

In contracts where it is determined that delivery of proprietary data is necessary with limited rights in the Government, the Rights in Technical Data clause of this section shall be supplemented by the additional paragraph (e), set forth below. Paragraph (e) provides that technical data may be specified in the contract as being excluded from the delivery requirements thereof. Alternatively, paragraph (e) may be limited or made applicable to only those classes of proprietary data determined as being necessary for delivery with limited rights. In addition, when furnishing proprietary data with the limited rights legend, subparagraphs (a), (b) and (c) thereunder may be modified as follows. When proprietary data is to be furnished only for evaluation, subparagraph (a) of the limited rights legend shall be used, and subparagraphs (b) and (c), if otherwise inapplicable, may be deleted. When there is a programmatic requirement that proprietary data be disclosed to other DOE contractors only for information or use in connection with work performed under their contracts, subparagraph (b) of the limited rights legend shall be used, and subparagraphs (a) and (c) may be deleted if otherwise inapplicable. In either of the foregoing examples, the contractor may, if he can show the possibility of a conflict of interest because of disclosure of such data to certain contractors or evaluators, exclude contractors or evaluators from subparagraphs (a) or (b). If the data is required solely for emergency repair or overhaul, subparagraph (c) of the limited rights legend shall be retained, and subparagraphs (a) and (b) may, unless otherwise applicable, be deleted. In the event that it is determined that all of the subparagraphs (a), (b) and (c) of the limited rights legend are to be deleted, the word "none" shall be inserted in the legend after the colon (:).

(e) Limited rights in proprietary data.

Except as may be otherwise specified in this contract as technical data which are not subject to this paragraph, the contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive paid-up license and right to use by or for the Government, any proprietary data of the contractor specifically used in the performance of this contract; provided, however, that to the extent that any proprietary data when furnished or delivered is specifically identified by the contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government, except as provided in the "Limited Rights Legend" set forth below. All such proprietary data shall be marked with the following "Limited Rights Legend":

LIMITED RIGHTS LEGEND

This technical data contains "proprietary data," furnished under "Contract No.___" with the U.S. Department of Energy (and purchase order No.___ if applicable) which may be duplicated and used by the Government with the express limitations that the "proprietary data" may not be disclosed outside of the Government or be used for purposes of manufacture without prior permission of the contractor, except that further disclosure or use may be made solely for the following purposes:

(a) This "proprietary data" may be disclosed for evaluation purposes under the restriction that the "proprietary data" be retained in confidence and not be further disclosed;

> (b) This "proprietary data" may be disclosed to other contractors participating in the Government's program of which this contract is a part for information or use in connection with the work performed under their contracts and under the restriction that the "proprietary data" be retained in confidence and not be further disclosed; or
>
> (c) This "proprietary data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "proprietary data" be retained in confidence and not be further disclosed.
>
> This legend shall be marked on any reproduction of this data in whole or in part.

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§9-9.202-5 Negotiations and deviations.

Contracting Officers shall contact the field Patent Counsel assisting their procuring activity, or the Assistant General Counsel for Patents, for assistance to the Contracting Officer in selecting, negotiating, or approving appropriate data and copyright clauses in accordance with the procedures as set forth in §9-9.107-4(k). In particular, advice of Patent Counsel should be obtained regarding the appropriateness or modification of optional paragraphs (g) and (h) of the Rights in Technical Data (long form) clause, the exclusion of specific items of proprietary data from paragraph (f) in said clause, and the exclusion of the Additional Technical Data Requirements clause of §9-9.202-3(c).

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PART 9-10 BONDS AND INSURANCE

§9-10.000 Scope of part.

This part implements and supplements the requirements on bonds and insurance set forth in FPR Part 1-10. Coverage relating to operating contractors is to be found in Subpart 9-50.10.

Subpart 9-10.1 Bonds

§9-10.102 Definitions.

§9-10.102-50 Fidelity bonds.

A "blanket fidelity bond" is a bond under which the obligor agrees to indemnify an employer up to an amount stated in the bond for losses caused by dishonesty on the part of all employees, except those expressly excluded by written endorsement on the bond. A blanket position fidelity bond affords the employer such protection with respect to all positions, except those expressly excluded by written endorsement on the bond. An individual fidelity bond affords the employer such protection with respect to a named individual, and a schedule fidelity bond protects the employer against the dishonesty of any employee or employees included in a schedule of named individuals.

§9-10.103 Bid guarantees.

§9-10.103-1 Policy on use.

In addition to the restriction on use of bid guarantees in FPR 1-10.103-1(a), a bid guarantee may be required only for lumpsum or unit price contracts entered into as a result of formal advertising, and may not be required for negotiated contracts.

§9-10.104 Performance bonds.

§9-10.104-2 Other than construction contracts.

Situations in addition to those listed in FPR 1-10.104-2(b), which may warrant requiring a performance bond are:

(a) Where doubt exists as to the financial or technical ability of all possible suppliers;

(b) Where the contractor's talent is overly concentrated in a few key personnel whose illness or departure could seriously impair the contractor's ability to perform the proposed work;

(c) Where other commitments of the contractor might delay performance;

(d) Where performance of the proposed work might disrupt other operations of the contractor and impair its overall efficiency; and

(e) Where the item being manufactured is a component for another article and is required by a particular date in order to avoid delay in delivery of the end product.

§9-10.105 Payment bonds.

§9-10.105-2 Other than construction contracts.

Determinations that it is in the best interest of the Government to require payment bonds in connection with other than construction contracts may be made by the Contracting Officer on individual procurements, subject to the approval of the Head of the Procuring Activity.

In the case of either advertised or negotiated procurements, whenever the Contracting Officer has reason to believe that work under a proposed contract might be delayed because of the concern of subcontractors or suppliers over the credit standing of a potential prime contractor, the Contracting Officer should consider the advisability of requiring a payment bond.

§9-10.109 Execution and administration of bonds.

(a) Bid bonds. Prior to award of a contract, the Contracting Officer shall obtain a review from General Counsel of the bid bond furnished with the successful bid as to legal form and sufficiency and as to acceptability of the surety. Prior to award of a subcontract, the Contracting Officer shall review the bid bond furnished with the successful bid as to legal form and sufficiency and as to acceptability of the surety and adequacy of the bond.

(b) Performance and payment bonds. Prior to award of a contract the Contracting Officer shall obtain review of such bonds as to legal form and sufficiency, acceptability of the surety, and adequacy of the bond. (See FPR 1-10.202.) A performance or payment bond, other than an annual bond, shall not antedate the contract to which it pertains.

§9-10.150 Fidelity bonds.

Fidelity bonds shall not be required in connection with fixed-price contracts. They may be required, however, in connection with cost-reimbursement contracts for supplies, construction, or for the operation of Government-owned plants, where it is determined that a fidelity bond is necessary for the protection of the Government or the contractor, or when it is considered desirable to obtain the investigative and claim services of the surety company.

Subpart 9-10.2 Sureties on Bonds

§9-10.250 Corporate co-sureties.

More than one corporate surety may be accepted as surety upon any recognizance, stipulation, bond or undertaking in connection with either construction contracts or contracts other than construction contracts, provided that in no case will the liability of any such co-surety exceed the maximum penal sum in which the corporate surety is qualified to underwrite any one obligation. On bonds covering contracts other than construction contracts, where the amount of the bond is greater than the underwriting limitation of the corporate surety, the latter may reinsure with a corporation on the acceptable list of corporate sureties having the required underwriting capacity. Corporate co-sureties need not obligate themselves for the full amount of the bond. Each corporate surety may, by setting forth the limit of its liability in the bond as a definite and specified sum, limit such liability. The co-sureties must, however, bind themselves "jointly and severally" for the purpose of allowing a joint action or actions against any or all of them.

§9-10.251 Partnerships as sureties.

A partnership or other unincorporated association, as such, shall not be accepted as a surety. The individual members of the partnership or association may, of course, qualify as sureties, provided they meet the requirements set forth in FPR 1-10.203. Individual members of a partnership or association shall not, however, be acceptable as sureties on bonds under which the partnership or association, or any co-partner or member thereof, is the principal obligor.

§9-10.252 Substitution or replacement of a surety.

In case of financial inadequacy, failure, or other disqualifying cause on the part of a surety under a bond, the Contracting Officer shall require the substitution of a new surety satisfactory to him.

Subpart 9-10.3 Insurance - General

§9-10.350 Contract article.

The contract article pertaining to insurance for operating contractors is set forth in §9-50.704-32.

Subpart 9-10.50 Indemnification of DOE Contractors

§9-10.5000 Scope of subpart.

This subpart describes the established policies concerning (a) indemnification of DOE contractors against public liability for a nuclear incident arising out of or in connection with the contract activity, and (b) indemnification of DOE contractors against liability for nonnuclear risks arising out of or in connection with the contract activity.

§9-10.5001 Applicability.

(a) With respect to indemnification against public liability for a nuclear incident, the pertinent policies and procedures set forth in this subpart shall be applicable in entering into indemnity agreements with:

(1) DOE contractors engaged in the operation of production or utilization facilities; and

(2) DOE contractors whose work entails the risk of public liability for a substantial nuclear incident.

(b) With respect to indemnification against liability for nonnuclear risks, the pertinent policies and procedures set forth in this subpart shall be applicable in entering into indemnity agreements with any DOE contractors.

§9-10.5002 Definitions.

(a) The term "DOE contractor" means any DOE prime contractor, including any agency of the Federal Government with which DOE has entered into an interagency agreement.

(b) The term "construction contractor" means a DOE contractor who is constructing an installation for DOE which, when completed, will be a production or utilization facility.

(c) The term "nuclear incident" means:

(1) Any occurrence within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material; and

(2) Any such occurrence outside the United States, if such occurrence involves a facility or device owned by, and used by or under contract with, the United States.

(d) The term "person indemnified" means:

(1) With respect to a nuclear incident occurring within the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability; or

(2) With respect to any nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with DOE or any project to which indemnification under the provisions of section 170 d of the Atomic Energy Act of 1954, as amended, has been extended, or under any subcontract, purchase order, or other agreement, of any tier, under any such contract or project.

(e) The term "production facility" means:

(1) Any nuclear reactor designed or used primarily for the formation of plutonium or uranium 233; or

(2) Any facility designed or used for the separation of the isotopes of uranium or the isotopes of plutonium, except laboratory scale facilities designed or used for experimental or analytical purposes only; or

(3) Any facility designed or used for the processing of irradiated materials containing special nuclear material, except laboratory scale facilities designed or used for experimental or analytical purposes only.

(f) The term "public liability" means any legal liability (including liability for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the contract activity arising out of or resulting from a nuclear incident, except: (1) claims under State or Federal workmen's compensation acts of employees of persons indemnified, who are employed at the site of and in connection with the activity where the nuclear incident occurs, and (2) claims arising out of an act of war. "Public liability" also includes damage to property of persons indemnified, provided that such property is covered under the terms of any financial protection that may be required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

(g) The term "substantial nuclear incident." See §9-10.5005.

(h) The term "utilization facility" means any nuclear reactor other than one designed or used primarily for the formation of plutonium or U 233.

(i) The term "nuclear reactor" means an apparatus, other than an atomic weapon, designed or used to sustain nuclear fission in a self-supporting chain reaction.

§9-10.5003 Statutory indemnity - section 170d of the Atomic Energy Act of 1954, as amended.

Section 170d of the Atomic Energy Act of 1954, as amended, authorizes DOE "to enter into agreements of indemnification with its contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident." Contractors identified in §9-10.5001(a) are eligible for such statutory indemnity.

§9-10.5004 Authority of Heads of Procuring Activities to negotiate statutory indemnity agreements.

(a) Heads of Procuring Activities are authorized to negotiate statutory indemnity agreements with contractors identified in §9-10.5001(a) (1).

(b) Pursuant to §9-10.5005, Heads of Procuring Activities are authorized to enter into a statutory indemnity agreement whenever it has been determined that a contractor in sub-paragraph (2) of §9-10.5001 (a), is engaged in activities involving the risk of public liability for a substantial nuclear incident. Such a determination may be based upon either the risk of liability for the occurrence of a substantial nuclear incident in the course of performance of the contract work, or the risk of liability for a substantial nuclear incident caused by a product delivered to or for DOE under the contract where such product is expected to be used in connection with a facility or device not covered by a statutory indemnity agreement. If, pursuant to §9-10.5005, a Head of a Procuring Activity determines that the maximum conceivable damage which could result from a nuclear incident arising in the course of a contractor's activities falls between $1 million and $60 million, he shall submit the proposed indemnification with a recommendation, and all supporting data, to the Head of the Agency or designee for appropriate action.

§9-10.5005 Substantial nuclear incident.

(a) With respect to subparagraph (2) of §9-10.5001(a), and pursuant to the provisions of §9-10.5004, a Head of a Procuring Activity may be required to determine whether a contractor's activities involve the risk of public liability for a substantial nuclear incident and thus make the contractor eligible to obtain a statutory indemnity agreement from DOE. The determination by a Head of a Procuring Activity shall be based on the criteria in (b) below.

(b) If, after a study of the maximum conceivable damage which can result from an incident arising out of or in connection with the contractor's activities, the Head of a Procuring Activity concludes that the maximum conceivable damage per incident to property and persons is $60 million or more, the contractor may be found to be under a risk of public liability for a substantial nuclear incident and the Head of the Procuring Activity is authorized to execute a statutory indemnity agreement under such a contract. If such a study of the maximum conceivable damage indicates a figure of $1 million or less, the contractor should not be considered to have a risk of public liability for a substantial nuclear incident, and therefore, shall not be made a party to a statutory indemnity agreement. If the study indicates that the maximum conceivable damage falls between $1 million and $60 million, the Head of a Procuring Activity will submit the proposed indemnification of such contractor to the Head of the Agency or designee with a recommendation and all supporting data.

(c) The Head of the Agency or designee, on such a recommendation, may take one of the following actions:

(1) Determine that the contractor is under risk of public liability for a substantial nuclear incident and that the contractor should be extended a statutory indemnity agreement; or

(2) Determine that the contractor should not be extended a statutory indemnity. In this case, the Head of the Agency or designee may authorize the Head of a Procuring Activity to authorize the contractor to purchase nuclear liability insurance or to offer the contractor a general authority indemnity agreement.

§9-10.5006 Statutory indemnity contract article.

The contract article contained in §9-50.704-6 shall be incorporated in all contracts in which a statutory indemnity agreement is to be included upon a determination that the contractor is under risk of public liability for the occurrence of a substantial nuclear incident in the course of performance of the contract work. The contract article contained in §9-50.704-7 shall be incorporated in all contracts in which a statutory indemnity agreement is to be included upon a determination that the contractor is under risk of public liability only for a substantial nuclear incident caused by a product delivered to or for DOE, under the contract where such product is expected to be used in connection with a facility or device not covered by a statutory indemnity agreement.

§9-10.5007 Contractual assurance.

Heads of Procuring Activities are authorized to include in all contracts for:

(a) Architect-engineer services in connection with the construction of a production or utilization facility;

(b) The supply of component parts (including construction contracts where the work does not entail the risk of occurrence of a substantial nuclear incident) for a production or utilization facility; and

(c) The supply of equipment or services which would be a part of, or, contribute to, or be used in connection with the construction or operation of a production or utilization facility, assurances that DOE will enter into a statutory indemnity agreement with the contractor who will operate a facility on its completion. Assurances will be given, however, only to those contractors and suppliers who might be held liable in connection with a substantial nuclear incident occurring after completion of the facility. The form of contractual assurance which shall be utilized is contained in §9-50.704-8.

§9-10.5008 "Representation" for use in subcontracts and purchase orders of prime contractor holding statutory indemnity agreement.

A DOE contractor with whom a statutory indemnity agreement has been executed in the form contained in §9-50.704-6 may include in any of its subcontracts and purchase orders a representation that the work under the prime contract is covered by a statutory indemnity agreement with DOE, and that this indemnity covers all persons who may be liable for public liability for any nuclear incident arising out of or in connection with the activity under the prime contract. A suggested form of "representation" follows:

> The contractor represents that there is included in its prime contract with DOE an indemnity agreement, entered into by DOE under the authority of Section 170 of the Atomic Energy Act of 1954, as amended by Public Law 85-256 (the "Price-Anderson Act"), a copy of which may be obtained from the contractor [is attached hereto]; that, under said agreement, DOE has agreed to indemnify the contractor and other persons indemnified, including the subcontractor, against claims for public liability (as defined in said Act) arising out of or in connection with the contractual activity; that the indemnity applies to covered nuclear incidents which (1) take place at a "contract location" (which term, as defined in the indemnity agreement, does not include the location of the subcontractor's plant and facilities); or (2) arise out of or in the course of transportation of source, special nuclear or by-product material to or from a "contract location"; or (3) involve items produced or delivered under the prime contract. The obligation of DOE to indemnify is subject to the conditions stated in the indemnity agreement.
>
> DOE will not approve the inclusion, in the subcontracts and purchase orders of an indemnified prime contractor, of any provision whereby the prime contractor indemnifies the subcontractor or supplier against public liability for a nuclear incident because any such liability will be covered by the statutory indemnity agreement of the prime contractor.

§9-10.5009 Fees.

No fee will be charged a DOE contractor for a statutory indemnity agreement.

§9-10.5010 Financial protection requirements.

(a) DOE contractors with whom statutory indemnity agreements under the authority of section 170 d of the Atomic Energy Act of 1954, as amended, are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability for nuclear incidents, except (1) that DOE contractors now covered by insurance against such liability, with the approval of the DOE, may continue to carry such insurance; and (2) with the approval of the Controller, contractors engaged in the operation of DOE facilities may be required or permitted to furnish financial protection in an amount not to exceed $1 million.

(b) If nuclear liability insurance is carried by a contractor who is a Nuclear Regulatory Commission (NRC) licensee, DOE will pay an equitable portion of the insurance premium under its contract (or would include such an item in the calculation of a fixed price), but normally a statutory indemnity agreement would not be granted under the contract.

§9-10.5011 General contract authority indemnity.

(a) DOE also has general contract authority to enter into indemnity agreements with its contractors. Under such authority a certain measure of protection is extended to the DOE contractor against risk of liability, but the assumption of liability by DOE will be expressly subject to the availability of appropriated funds. Prior to enactment of section 170 of the Atomic Energy Act of 1954, as amended, this authority was exercised in a number of Atomic Energy Commission contracts and this type of indemnification remains in some DOE contracts.

(b) It is the policy of DOE, subsequent to the enactment of section 170, to restrict indemnity agreements with DOE contractors, with respect to protection against public liability for a nuclear incident, to the statutory indemnity provided under section 170. However, it is recognized that circumstances may exist under which a DOE contractor may be exposed to a risk of public liability for a nuclear occurrence which would not be covered by the statutory indemnity.

(c) While it is normally DOE policy to require its contractors to obtain insurance coverage against public liability for nonnuclear risks, there may be circumstances in which a contractual indemnity may be warranted to protect a DOE contractor against liability for uninsured nonnuclear risks.

(d) If circumstances as mentioned in paragraph (b) or (c) of this section do arise, it shall be the responsibility of the Heads of the Procuring Activities to submit to the Head of the Agency or designee for his review and decision, all pertinent information concerning the need for, or desirability of, providing a general authority indemnity to a DOE contractor.

(e) Where the indemnified risk is nonnuclear, the amount of general authority indemnity extended to a fixed-price contractor should normally have a maximum obligation equivalent to the amount of insurance that the contractor usually carries to cover such risks in his other commercial operations or, if the risk involved is dissimilar to those normally encountered by the contractor, the amount that it otherwise would have reasonably procured to insure this contract risk.

(f) In the event that a DOE contractor has been extended both a statutory indemnity and a general authority indemnity, the general authority indemnity will not apply to the extent that the statutory indemnity applies.

(g) The provisions of this subsection do not restrict or affect the policy of DOE to pay its cost-reimbursement type contractors for the allowable cost of losses and expenses incurred in the performance of the contract work, within the maximum amount of the contract obligation.

§9-10.5012 Service type insurance policies.

(a) Service type insurance policies are cost reimbursement type contracts or subcontracts in which the insurer provides claim and loss adjustment services on a cost reimbursement basis, which satisfies state and Federal insurance requirements.

(b) Service type insurance policies may be used when one or more of the following criteria are present and the Contracting Officer approves:

(1) Pure risk commercial insurance is not available or, if available, cost is not considered reasonable;

(2) Inherent risks in the contract are new and a part of the process of commercialization;

(3) The service type insurance is needed to implement jointly funded projects; or

(4) The service type insurance arrangement is considered in the Government's best interest.

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PART 9–12 LABOR

§9–12.000 Scope of part.

(a) This part implements and supplements FPR Part 1–12.

(b) The DOE provisions pertaining to operating and on-site service contractors' procurement are in subpart 9–50.12 and as specified below.

Subpart 9–12.1 Basic Labor Policies

§9–12.100 General.

Except as provided herein, Contracting Officers shall follow the guidance in FPR Subpart 1–12.1. Contracting Officers shall apply the principles and policies set forth in §9–50.1201 and §9–50.1210 through §9–50.1213 adapting FPR 1–12.101 to certain cost-type construction and architect-engineer contracts and such other contracts to which these principles and policies are deemed appropriate.

§9–12.102 Overtime, extra-pay shifts, and multishift work.

(a) The provisions of FPR 1–12.102 and this section apply to all DOE contracts including construction and procurement by operating and on-site service contractors.

(b) Approvals.

Where the cost to the Government may be affected, approval of hours of work in excess of the normal workweek is justified only in those instances and for those employees when it can be shown that overtime would provide needed and demonstrable impetus to the accomplishment of DOE objectives and that all other means of meeting these needs have been considered and found inadequate or not feasible. Accordingly, Heads of Procuring Activities shall:

(1) Establish controls to prevent excess casual overtime and to assure that such overtime work is in the best interests of the Government. By casual overtime is meant (i) work in excess of the normal workweek (or in excess of an authorized extended workweek) which cannot be regularly scheduled in advance, or (ii) regularly scheduled work in excess of the normal workweek for a period of four consecutive weeks or less; and

(2) Establish controls to assure that any use of any extended workweek schedule is in the best interest of the Government. Extended workweek means a workweek regularly scheduled and established in an excess of the normal workweek for a period in excess of four consecutive weeks.

Subpart 9-12.6 Walsh-Healey Public Contracts Act

§9-12.604 Responsibilities of Contracting Officers.

(e) When an eligibility determination made by the Contracting Officer is challenged, this protest shall be handled in accordance with procedures for agency protests against award, except the matter shall be submitted to the Department of Labor for final determination. However, if the eligibility determination challenged pertains to a small business, the protest shall be forwarded to the Small Business Administration for determination.

Subpart 9-12.8 Equal Opportunity In Employment

§9-12.800 Scope of subpart.

This subpart implements FPR 1-12.8. It applies to all DOE contracts and subcontracts and may be adapted to programs involving Federal assistance.

§9-12.805 Administration.

§9-12.805-1 Duties of the agency.

(a) The Director, Office of Federal Contract Compliance Programs of the Department of Labor has been delegated authority and responsibility for carrying out the requirements of Executive Order 11246, as amended. In conjunction with the delegation, Contracting Officers shall be familiar with existing and any updated provisions of 41 CFR, Chapter 60, and assist the Department of Labor in its compliance responsibilities. DOE Contracting Officers will include the applicable EEO and AAP (Affirmative Action Program) requirements in their solicitations and obtain the applicable reports of compliance from OFCCP (when required) prior to awarding of contracts. The provisions of 41 CFR, Chapter 60, are applicable to all existing and prospective DOE contractors including construction contractors performing work at Government-owned or supported facilities and sites.

(b) The Office of Federal Contract Compliance requires that requests for pre-award clearances be directed to OFCCP Regional Office in which the contractor's facility is (to be) located. If the compliance agency finds the contractor in compliance, the Contracting Officer will be notified. Findings of non-compliance can only be communicated to the Contracting Officer by the OFCCP or Headquarters Director or his designee. The appropriate Regional Office will provide the appropriate contact point in cases of non-compliance. The Director, Office of Industrial Relations (DOE HQ), when requested, will provide assistance to Contracting Officers resolving non-compliance issues by providing assistance in obtaining a final decision from the Office of Federal Contract Compliance Programs.

§9-12.805-51 Pre-award requirements — nonexempt contracts and subcontracts.

(a) Nonconstruction contracts. Prior to the award of a nonconstruction, nonexempt contract, modification of an existing contract for a new effort which would constitute a contract award, issuance of any basic ordering agreement, award of any indefinite delivery contract or letter contract, the estimated or total amount of which is or is expected to aggregate $1,000,000 or more or increase the aggregate value of an existing contract to $1 million or more, the Contracting Officer shall determine that, as outlined in FPR 1-12.805-5(d), the prime contractor and each of its known first-tier subcontractors which will be awarded subcontracts of $1 million or more are in compliance with the Equal Opportunity clause pursuant to 41 CFR 60-1. In the event that the prospective contractor or subcontractor has not held a previous contract containing the Equal Opportunity clause, the Contracting Officer shall determine that the prospective contractor appears able to conform to the requirements of the EEO clause. The Contracting Officer shall request the cognizant regional office of OFCCP to make this determination which is required by FPR 1-12.805.5.

(b) Construction contracts.

(1) Construction contracts, including cost-sharing contracts, are subject to Office of Federal Contract Compliance Programs (OFCCP) orders applicable in particular areas.

(i) When a proposed nonexempt Federal or Federally-assisted construction contract is within a geographic area where construction is subject to the provisions of Federal EEO Bid Conditions, Part I or Part II, the solicitation shall contain those bid conditions. The Contracting Officer shall include in such solicitation a statement that "the offeror shall adhere to the affirmative action plan (bid conditions) set forth in this solicitation."

(ii) Lists of areas for which OFCCP has designated specific affirmative action requirements are available through the Office of Contractor Industrial Relations. Contracting Officers should assure that this list and copies of pertinent orders are made available to all concerned DOE procurement offices and to DOE contractors and construction subcontractors for work to be performed in the specified geographical areas.

(2) Other nonexempt construction contracts.

(i) When a proposed nonexempt Federal or Federally-assisted construction contract is not in a "plan area" and is in the amount of $10,000 or more, offerors must agree to comply with the Equal Opportunity clause.

(ii) When proposed nonexempt contracts of $1,000,000 or over are not in plan areas and have not been designated as high impact, offerors also must submit to the Contracting Officer details regarding specific affirmative action steps to be taken by the offeror in connection with all work under the contract. Such details shall include estimates of the percentage of minority group persons expected to be employed in each craft involved in the performance of the contract work. All solicitations for construction contracts shall reference the affirmative action requirements and the offeror's obligation to make good faith efforts to employ women in craft positions.

(iii) Pursuant to the Office of Federal Contract Compliance Programs (OFCCP) order dated August 30, 1976, agencies shall develop "Special Bid Conditions" for use on high impact projects in non-plan areas. These special bid conditions will include mandatory goals and timetables for the utilization of minorities. The Office of Contractor Industrial Relations using the criteria issued by OFCCP will determine those projects that are "high impact." The Contracting Officer is responsible for compliance with policies and procedures contained in the OFCCP "Construction Compliance Program Operations Manual." Language for inclusion in solicitation or contracts contained in the manual may be modified, provided all of the requirements are retained. The Contracting Officer shall develop the goals and timetables and shall confer with the appropriate OFCCP regional office. The Office of Contractor Industrial Relations will provide assistance as necessary, when requested. Special bid conditions will be submitted by the Contracting Office to the appropriate OFCCP regional office for approval unless otherwise directed by the Office of Contractor Industrial Relations. When special bid conditions are applicable, adequate presolicitation lead time should be allowed for submission of the special bid conditions to OFCCP national and regional offices.

(3) Failure to submit an unqualified bid or proposal. Attempt to limit in any major respect the equal opportunity requirements included in an invitation for bid or request for proposal for a construction contract shall constitute grounds for a determination that the offeror does not qualify as a responsible offeror and for rejection of the bid or proposal.

§9-12.805-53 Referral list.

The Office of Federal Contract Compliance Programs (OFCCP) maintains a list of firms for which special attention is required before entering into contracts. The Senior Procurement Official, Headquarters, or designee is responsible for the maintenance and distribution of such lists and will provide updated copies to Contracting Officers.

§9-12.810 Affirmative Action Compliance Programs (AACP).

(a) Whenever a nonexempt, nonconstruction contractor has 50 or more employees and a contract of $50,000 or more, or a nonexempt construction contractor has a regular work force of 50 or more and the contract is in the amount of $50,000 or more, the contractor shall develop a written affirmative action compliance program for each of its establishments, unless the contract is exempt as per FPR 1-12.804. Each prime contractor and subcontractor shall require each subcontractor who has 50 or more employees and a subcontract of $50,000 or more, to develop a written AACP for each of its establishments, unless the subcontract is exempt as per FPR 1-12.804. Elements of a satisfactory AACP are outlined in 41 CFR 60-2.

(b) Within 120 days from the start of the contract or subcontract, each contractor or subcontractor shall maintain a copy of separate AACPs for each establishment at each local office responsible for personnel matters of such establishment. An AACP shall become part of the human resource and development plans for each new establishment and be made available prior to the staffing of a new establishment. Results of such programs shall be compiled periodically, as prescribed by DOE, but not less frequently than annually, and the program shall be updated annually. This information shall be made available to representatives of the agency or Director, Office of Federal Contract Compliance Programs, upon request.

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PART 9-15 CONTRACT COST PRINCIPLES AND PROCEDURES

§9-15.000 Scope of part.

This part 9-15 implements and supplements FPR 1-15 which contains general cost principles and procedures for the pricing, negotiation, and administration of contracts including subcontracts and contract modifications. The principles and procedures set forth in FPR 1-15 are mandatory, except as implemented and supplemented by specific DOE-PR provisions.

Subpart 9-15.1 Applicability.

§9-15.101 Scope of subpart.

The cost principles and procedures contained in this subpart and FPR 1-15 apply to all negotiated procurements except for operating contracts for DOE-owned plants and laboratories, on-site service contracts, on-site construction contracts, and on-site architect-engineer contracts which are covered in §9-50.15.

§9-15.103 Contracts with educational institutions.

The cost principles in FPR Subpart 1-15.3 shall be incorporated by reference or attachment in cost-reimbursement research contracts with educational institutions to which they are applicable. However, contracts with educational institutions for the operation of DOE-owned contractor-operated research laboratories are governed by the principles in subpart 9-50.15 and 9-50.704-13.

§ 9-15.107 Advance understandings.

See § 9-15.5006-4 for further guidance.

Subpart 9-15.2 Contracts with Commercial Organizations

§ 9-15.205-3 Bidding costs.

A contractor's bid and proposal costs are allowable in accordance with the provisions in § 9-15.205-35 of this Part 9-15.

§9-15.205-6 Compensation for personal services.

(f) Deferred compensation.

(2)(ii)(1)(viii) The allowability of the cost of indemnification of the Pension Benefit Guaranty Corporation (PBGC), pursuant to Section 4062 or 4064 of the Employee Retirement Income Security Act of 1974 (ERISA), because of the termination of an employee deferred compensation plan will be considered on a case-by-case basis, providing that if insurance was required by the PBGC pursuant to Section 4023 of ERISA, it was so obtained, and the indemnification payment is not recoverable thereunder. Consideration under the foregoing circumstances will be primarily for the purpose of appraising the extent to which the indemnification payment is allocable to Government work; and if a beneficial or other equitable relationship exists, the Government will participate, provisions of 1-15.205-16(a)(3) and 1-15.205-16(b) notwithstanding, in the indemnification payment to the extent of its fair share.

§9-15.205-16 Insurance and indemnification.

(c) Late premium payment charges related to employee deferred compensation plan insurance, incurred pursuant to Section 4007 or Section 4023 of the Employee Retirement Income Security Act of 1974, are unallowable.

§ 9-15.205-30 Precontract costs.

See § 9-15.5006-4 for further guidance.

§ 9-15.205-35 Independent research and development (IR&D) and bid and proposal (B&P) costs.

(a) *Definitions.*

For the purpose of this § 9-15.205-35:

(1) The term "Independent research and development" (IR&D) means those research and development efforts which are not (i) sponsored by outside sources or (ii) required in performance of a contract, grant, or cooperative agreement.

(2) The term "Research" means:

(i) "Basic research" which is the systematic, intensive study directed toward greater knowledge and understanding of the subject studied; or

(ii) "Applied research" which is the systematic study directed specifically toward applying new knowledge to meet a potential or recognized need. As intended herein, attempts to determine and exploit the potential of scientific discoveries or improvements in technology, materials, processes, methods, devices, or techniques, and attempts to advance the state of the art are efforts of applied research.

(3) The term "Development" means the systematic application and use of scientific and technical knowledge directed toward the design, development, test, and evaluation of useful materials, devices, systems, and operations for potential new products or services or improvement in an existing product or service to meet specific requirements. It includes technology development, concept and demonstration development, and full-scale development, as follows:

(i) "Technology development" is the systematic application of knowledge toward proof of technology, including development of nonspecific application prototypes and processes.

(ii) "Concept and demonstration development" is the systematic application of knowledge toward identification of solutions to meet specific requirements, including development of specific application prototypes and processes.

(iii) "Full-scale development" is the systematic application of knowledge toward production of useful materials, devices, systems, or methods, including design, development, and improvement of equipment and processes to meet specific requirements.

(4) The term "Bid and proposal" (B&P) refers to those efforts, neither sponsored by a grant or cooperative agreement nor required in the performance of a contract, expended in preparing, submitting, and supporting any bids and proposals (whether or not solicited) for Government or non-Government business. It covers:

(i) Administrative efforts, including the nontechnical effort for the physical preparation of technical proposal documents, and the technical and nontechnical effort for the preparation and publication of the cost data and other administrative data necessary to support a business organization's bids and proposals.

(ii) Technical efforts incurred to specifically support a bid or proposal, including the costs of system and concept formulation studies and the development of engineering and production engineering data.

(5) The term "business organization" includes all segments (i.e., divisions, subsidiaries, affiliates, or business units) of a business entity under a common control.

(6) The term "business unit" means any segment of an organization, or an entire business organization which is not divided into segments.

(7) The term "segment" means one of two or more divisions, product departments, plants, or other subdivisions of an organization reporting directly to a home office, usually identified with responsibility for profit and/or producing a product or service. (The term includes Government-owned contractor-operated (GOCO) facilities, and joint ventures and subsidiaries (domestic and foreign) in which the organization has a majority ownership. The term also includes those joint ventures and subsidiaries (domestic and foreign) in which the organization has less than a majority of ownership, but over which it exercises control.)

(8) The term "home office" means an office responsible for directing or managing two or more, but not necessarily all, segments of an organization. It typically establishes policy for, and provides guidance to the segments in their operations. It usually performs management, supervisory, or administrative functions, and may also perform service functions in support of the operations of the various segments. An organization which has intermediate levels, such as groups, may have several home offices which report to a common home office. An intermediate organization may be both a segment and a home office.

(b) *Allowability.* (1) The cost of IR&D and B&P efforts shall be allowable and recoverable under DOE contracts in accordance with paragraph (f) of this section provided the costs are measured and accounted for as described in paragraph (c) of this section, are reasonable in amount as determined in paragraph (d) of this section, and are allocated in accordance with paragraph (e) of this section. However, these requirements shall not be applied (unless the contractor elects otherwise) when the combined total of the costs for IR&D and B&P is $100,000, or less. Such costs shall be treated as indirect costs, allocated to all cost objectives of the business unit or segment incurring the costs, provided they are otherwise allowable in accordance with the general principles of FPR 1-15.2, as implemented and supplemented by the DOE regulations in this Subpart 9-15.2.

(2) Allowability of IR&D and B&P as defined and provided for herein is not applicable to contracts covering operation of Government-owned or leased facilities, and other cost-type contracts that require the use of DOE cost principles set forth in DOE PR 9-50.15.

(c) *Accounting for IR&D and B&P.* (1) The basic unit for the identification and accumulation of IR&D and B&P cost shall be the individual IR&D and B&P project. However, when the costs of individual IR&D and B&P efforts are not material in amount (less than $25,000 per project) these costs may be accumulated in one or more projects within each of these two types of efforts.

(2) IR&D and B&P project costs shall be accumulated into IR&D and B&P cost pools. The IR&D and B&P cost pools for a business unit or segment shall consist of that segment's IR&D and B&P project costs benefiting only that segment, plus (i) the allocable home office IR&D and B&P costs, and (ii) those IR&D and B&P costs that may be allocated directly to it from another segment.

(3) B&P cost incurred in a given cost accounting period is not assignable or deferrable to any other cost accounting period for recovery under DOE contracts.

(4) IR&D cost incurred in a cost accounting period shall not be assigned to any other cost accounting period for recovery under DOE contracts except as may be permitted pursuant to provisions of existing laws, regulations, or other controlling factors.

(5) Each IR&D and B&P program or effort shall be treated as if it were a final cost objective. The IR&D and B&P project shall include all direct costs incident to its performance. IR&D and B&P and project costs shall also include an allocable portion of allowable indirect costs (i.e., overhead costs of productive activity and any other indirect costs) related to the project, allocated in accordance with generally accepted accounting principles or, where required. Government cost accounting principles and standards for allocation of indirect costs. Allowable IR&D and B&P project costs shall not include allocations of general and administrative expenses.

(d) *Reasonableness.* A determination of reasonableness shall be made as follows:

(1) Through negotiation of advance ceilings, when required as specified in paragraph (g) of this section establishing maximum dollar amounts of allowable (reasonable) cost for allocation to all work.

(2) By application of a formula, computed as described in paragraph (h) (1) and (2) of this section.

(3) Through negotiation under the exception set forth in paragraph (h)(3) of this section.

(e) *Allocation.* (1) IR&D and B&P costs properly accumulated in a segment's or business unit's IR&D and B&P cost pools shall be recoverable as a cost under DOE contracts only if they are allocated to DOE contracts with that segment or business unit, as if they were an indirect expense. Allocations must be made by the contractor on the same allocation base used in allocating to its Government contracts, the general and administrative (G&A) expense of that business unit or segment in which the IR&D and B&P costs are incurred.

(2) Where the use of the G&A base for allocation of IR&D and B&P expense to final cost objectives does not provide an equitable allocation or distribution to a partic-

ular DOE contract or all of DOE's contracts, approval may be granted for use of a different base for DOE contracts, or for a special allocation to DOE final cost objectives commensurate with the benefits received unless otherwise prohibited by applicability of Cost Accounting Standards Regulations, or other authority. The amount of any particular special allocation pursuant to such an agreement shall be excluded from the IR&D and B&P cost pools to be allocated to other DOE final cost objectives; and the particular cost objective base data shall be excluded from the base used to allocate these pools.

(3) The cost of any work performed by one segment for another segment shall not be accounted for as IR&D and B&P cost of the performing segment unless the work is part of an IR&D and B&P project of the performing segment. The cost of such work shall be allocated directly to the benefiting segment or transferred to a home office for allocation to its segments. Direct allocation to the benefiting segment is allowed, provided that such allocation is not substantially different from the allocation that would be made were it first allocated to a home office and reallocated to the benefiting segment.

(4) IR&D and B&P project costs accumulated at a home office shall be directly allocated (for assignment to cost objectives) to any specific segment or business unit, where such costs are directly identified with that segment. The cost of all other IR&D and B&P projects accumulated at a home office shall be allocated among all segments by means of the same base used to allocate its other general and administrative office expenses. However, where a segment receives significantly more or less benefit from the IR&D and B&P projects than will be reflected by the allocation of their cost using this base, a special allocation may be agreed upon, commensurate with the benefits received. The amount of any such special allocation shall be excluded from the pools to be allocated to other segments, and the base data of any such segment shall be excluded from the base used to allocate these pools.

(5) Where the allocable IR&D and B&P costs are established by negotiation, the memorandum of agreement shall specify the allocation procedure and base for assignment of cost to DOE contracts.

(f) *Recovery of cost.* (1) The maximum total amount of annual IR&D costs recoverable under all DOE contracts with a business unit or segment shall not exceed (i) those contracts' allocable share of the business unit's (or segment's) total allocable IR&D amounts (as established in accordance with paragraphs (d) and (e) of this section), or (ii) the total cost of the business unit's (or segment's) annual IR&D activities determined to have potential benefit or relationship to the DOE program, whichever is less.

(2) The maximum total amount of B&P cost which is recoverable under DOE contracts with a business unit (or segment) shall be those contracts' share of the allocable B&P expense computed in accordance with paragraphs (d) and (e) of this section.

(3) The organization, business unit, or segment shall submit no later than 90 days after the close of the cost accounting period (or with any annual final overhead rate proposal) for which IR&D shall be claimed for reimbursement under DOE contracts, a written statement identifying those IR&D projects, and the cost incurred therefor, it believes to be of benefit to the DOE program. Notwithstanding the provisions of this paragraph (f), the DOE reserves the right to make the final decision as to benefit to the DOE program.

(4) No IR&D and B&P cost shall be recoverable under a DOE contract if negotiation of a required advance ceiling agreement is not initiated prior to the end of the fiscal year for which the agreement is required.

(5) For purposes of this paragraph (f), the term "DOE program" encompasses the DOE total mission and its objectives. However, IR&D costs that exceed the benefit threshold at one business unit or segment of a business organization cannot be used to offset IR&D costs that are less than the benefit threshold of another segment or business unit.

(g) *Advance agreements.* (1) Any business organization which, during its most recent completed fiscal year, receives from the DOE conjunctive IR&D and B&P payments under DOE prime contracts or subcontracts for which submission or certification of cost or pricing data was required) which are in excess of $4 million, shall be required to initiate and negotiate with the DOE an advance agreement(s) that establishes a separate ceiling, i.e., one each, for the allocable IR&D and B&P costs, to be recovered under its DOE contracts for the following fiscal year.

(2) When a business organization meets the criteria for negotiation of advance ceilings, the ceilings may be negotiated at the home office level and/or with those business units or segments which contract directly with the DOE and which in the preceding year allocated recoverable IR&D and B&P expenses of $500,000 or more to DOE contracts and subcontracts for which submission and certification of cost or pricing data was required. When ceilings are negotiated for separate business units or segments, the ceiling limits of allocable IR&D and B&P costs for any activity, which in its previous fiscal year did not reach the $500,000 threshold, may be determined in accordance with the formula approach.

(3) When negotiations of advance ceilings are required and negotiations were initiated but (i) no agreement of an acceptable ceiling can be reached, and/or (ii) negotiations have not established a ceiling prior to the end of the fiscal year for which compliance is required, negotiations shall be immediately terminated and the DOE negotiating activity shall establish allowable and allocable amounts. The amount of such of a determination shall not be less than an amount which, in the opinion of the DOE contracting activity, the organization or business unit should be entitled to receive under a negotiated ceiling and/or the DOE benefit threshold. Written notification of the determination of amount shall be furnished the contractor.

(4) Business organizations that meet the threshold in paragraph (q)(1) of this section shall submit their request for negotiations, together with supporting technical and financial documentation, in accordance with guidance furnished by the DOE contracting officer.

(h) *Formula application.* (1) Reasonable (allocable) IR&D and B&P costs for business organizations not required to negotiate advance agreements, except as specified in paragraph (h)(3) of this section, shall be determined on a historical or "after-the-fact" basis for a business unit, segment, or home office using the technique in paragraph (h)(2) of this section. The formula shall be applied separately to IR&D costs and to B&P costs.

(2) Current year IR&D and B&P cost shall be considered reasonable, if each amount is not in excess of the product of the organization's, business unit's, or segment's actual total sales (or other base acceptable to the DOE) for the year and the respective "historical ratio" as determined in accordance with paragraph (h)(2)(i) of this section; provided, however, that such product shall not exceed 120 percent or be less than 80 percent of the average as determined in accordance with paragraph (h)(2)(ii) of this section. Amounts greater than these limitations are unallowable (i.e., the amount of the B&P "product" that exceeds 120 percent of the "average" is unallowable; or, if the product is less than 80 percent of average, only costs up to 80 percent of average are allowable).

(i) The "historical ratio" is the average of the two highest ratios of IR&D (or B&P) costs to sales for each of the preceding three years.

(ii) The "average" is the average of the two highest annual cost amounts for IR&D (or B&P) as incurred for each of the preceding three years.

(3) At the discretion of the contracting officer, the reasonableness (allocability) of IR&D and B&P costs may be negotiated when the contractor can demonstrate that the formula would produce an inequitable cost recovery. Such negotiations may be "after-the-fact" or prior to incurrence of the cost.

(4) Where no DOE advance negotiation is required to establish reasonableness, but an advance ceiling requirement for allowability of IR&D exists due to other Government agency regulations, and such an agreement has been executed by that activity for the current year, the agreement may be recognized as meeting the reasonableness criterion of paragraph (d)(2) of this section and application of the formula need not be made.

(i) *IR&D and B&P Interchangeability.* Due to the similarity of IR&D and B&P costs regarding concept and system studies and the development of engineering and production engineering data, the allowable IR&D for allocation and recovery may exceed the required ceiling, provided the B&P ceiling provision is reduced by the same amount. Notwithstanding this provision, the recoverable IR&D amounts are still governed by paragraph (f) of this section. B&P shall not exceed the required ceiling.

(j) *Appeals.* DOE contracting officer determinations of allocable and allowable IR&D and B&P costs, when efforts for advance agreements are unsuccessful, are subject to appeals. Such appeals shall be directed to the Senior Procurement Official, Headquarters, Department of Energy, within 30 days of receipt of the written determination.

§9-15.205-41 Taxes.

(d) The cost of taxes on accumulated funding deficiencies of, or prohibited transactions involving, employee deferred compensation plans pursuant to Section 4971 or Section 4975 of the Internal Revenue Code of 1954, as amended, respectively, is unallowable.

§ 9-15.205-60 (Reserved)

Subpart 9-15.3 Contracts with Educational Institutions

§9-15.307 Determination and application of indirect cost rate or rates.

(a) Overhead rates shall be determined by after-the-fact audit, except as provided in paragraph (b) of this section.

(b) Predetermined fixed overhead rates may be used in cost-type research and development contracts with educational institutions (Public Law 87-638). The use of such rates is permissive and not mandatory. (See OMB Circular A-21.) In determining whether or not predetermined fixed overhead rates should be used in a particular contract, consideration should be given to the degree of stability shown in overhead rates and their bases over a period of years. All anticipated changes in the contractor's volume and overhead shall be taken into consideration. In establishing such predetermined overhead rates, the following guidelines shall be used:

(1) The contractor, as soon as possible, but not later than three (3) months after the expiration of each fiscal year, shall submit to the Contracting Officer a proposed predetermined overhead rate or rates for use during the contract year based on the contractor's actual cost experience during the immediately preceding fiscal year, together with supporting cost data.

(2) Negotiation of predetermined fixed overhead rates shall be for a period of 1 year only and should generally be based on an audit of the institution's costs for the year immediately preceding the year in which the rate is being negotiated. If this is not possible, an earlier audit may be used, but appropriate steps should be taken to identify and evaluate significant variations in costs incurred or bases used which may have a bearing on the reasonableness of the rate proposed by the contractor. (Audits by other Government agencies may be utilized.) In the case of small contracts ($100,000 or less), an audit made at an earlier date is acceptable, provided (i) there have been no significant changes in the contractor's organization, and (ii) it is reasonbly apparent that having another audit made would result in little effect on the rate to be finally agreed upon.

(3) Predetermined overhead rates shall not be used for operating contracts (see Subpart 9-50.15).

(4) The use of predetermined fixed overhead rates in the following circumstances must have the approval of the Head of the Procuring Activity:

(i) Where DOE-owned facilities and equipment exceed $1,000,000;

(ii) Where estimated reimburseable costs for the contract are expected to exceed $1 million annually;

(iii) Where there has been no recent audit of the overhead; or

(iv) Where there have been frequent or wide fluctuations in overhead rates and their bases over a period of years.

OMB Control No.: 1901—0021.

Subpart 9-15.50 Contract Cost Policies and Procedures

§9-15.5000 Scope of subpart.

(a) This subpart sets forth general policies and procedures to be used as guidance in determining allowable costs of cost type contracts, except for educational institutitions.

(b) This subpart also provides guidance for the evaluation of costs in negotiated fixed-price type contracts and subcontracts where costs incurred are a factor in determining the amount payable.

§9-15.5001 Definitions.

(a) "Cost-type contract" includes cost, cost sharing, cost plus-a-fixed-fee, cost plus award fee, and cost plus incentive fee contracts.

(b) "Cost-type subcontract" is a cost-type arrangement in any tier under a cost-type prime contract where all higher-tier arrangements are on a cost basis.

(c) "Construction contract" is a contract for the construction, alteration, or repair of public buildings and public works.

(d) "Architect-engineer contract" is a contract for architect-engineer services related to the construction, alteration, or repair of public buildings and public works.

(e) "Off-site architect-engineer contract" is a contract where the design work is performed in the contractor's central or branch office.

(f) "Supply contract" is a contract for supplies and services, other than operating, construction, onsite architect-engineer, experimental, developmental, or research work and personal services.

(g) "Research and development contract" is a contract for basic research (directed toward the increase of knowledge in science), applied research (involving the determination and expansion of the potentialities of new scientific discoveries or improvement in technology, materials, processes, methods, devices, and techniques including attempts to "advance the state of the art") or development (the systematic use of scientific knowledge which is directed toward the production of, or improvements in, useful products to meet specific performance. which is directed toward the production of, or improvements in, useful products to meet specific performance requirements, but exclusive of manufacturing and production engineering).

§9-15.5002 Responsibilities.

(a) The Senior Procurement Official, Headquarters, is responsible for developing and revising the policy and procedures for the determination of allowable costs, and for seeing that they are properly coordinated with the General Counsel, and other Headquarters offices having joint interests.

(b) The Head of the Procuring Activity is responsible for following the policy, principles and standards set forth herein in establishing the compensation provisions of contracts and subcontracts and for submission of deviations for Headquarters consideration.

§9-15.5003 Deviations.

Deviations from the policy and principles set forth in this subpart shall not be made unless such action is authorized by the Senior Procurement Official, Headquarters, after consultation with the General Counsel, and any other appropriate Headquarters office, on the basis of a written justification stating clearly the special circumstances involved. Where appropriate, any approved deviation shall be reflected in the compensation provisions of the contract.

§9-15.5004 Advance understandings on particular cost items.

It is important that agreement between DOE and its contractors be reached in advance of the incurrence of costs in categories where reasonableness or allocability are difficult to determine in order to avoid possible subsequent disallowance or dispute. Any such agreement should be incorporated in cost-type contracts and should govern the cost treatment covered thereby. But the absence of such agreement on any element of cost will not, in itself, serve to make that element either allowable or unallowable. Examples of costs on which advance agreements may be particularly important are:

(a) Deferred maintenance costs;

(b) Precontract costs;

(c) Professional or technical consulting services;

(d) Reconversion costs;

(e) Research and development costs;

(f) Royalties;

(g) Selling and distribution costs;

(h) Unemployment insurance experience ratings;

(i) Employee compensation, travel including relocation costs, and other personnel costs. DOE generally utilizes two basic methods of achieving and recording understandings with contractors as to the allowability of employee compensation, travel, and other personnel costs: Negotiation of a personnel appendix to the contract which sets forth the policies, programs, and schedules which are accepted as the basis for determining the allowability of costs; or reviewing and reaching agreement on established policies, programs, and schedules (and any changes thereto during the contract term) applicable to the contractor's private operations which are acceptable for contract work and which will be consistently followed throughout the contractor's organization (See §9-15.5006-7). A personnel appendix to the contract setting forth advance understandings covering compensation for personal services shall be utilized in operating contracts (as defined in §9-50.001) and other contract situations when one or more of the following circumstances exist: When policies, programs, and schedules are established specifically for contract work; when the contractor's work is predominantly or exclusively made up of negotiated Government contract work; when contract work is so different from the organization's private work that existing established policies, programs, and schedules cannot reasonably be extended to and consistently applied on contract work; or, when established policies, programs, and schedules proposed for contract work are not sufficiently definitive to permit a clear advance mutual understanding of allowable costs and to provide a basis for audit. The head of the procuring activity is authorized to select the alternative method of achieving and recording advance understanding that they find most appropriate after considering the facts of the particular contract situation. Employee compensation, travel, and other personnel costs as used in this paragraph include:

(1) Compensation for personal services, including wages and salaries, bonuses and incentives, premium payments, pay for time not worked, and supplementary compensation and benefits, such as pension and retirement, group insurance, severance pay plans, and other forms of compensation;

(2) Morale, health, welfare, and food service and dormitory costs;

(3) Training and education costs; and

(4) Employee travel costs, including travel on official business, relocation of employees, foreign travel, travel of executive officers, and special or mass personnel movement.

§9-15.5005 Direct and Indirect costs (See FPR 1-15.202 & 203)

§9-15.5006 Application of basic policies to particular situations

§9-15.5006-1 Overtime, shift, and holiday premiums.

(a) Overtime, shift, and holiday premiums are allowable only to the extent provided in the contract or approved by the Contracting Officer. The amount of such premiums charged to a DOE contract shall be equitable in relation to the amount of such costs charged to other work currently performed in the contractor's plant and the factors which necessitate this incurrence of the cost. When the necessity for overtime, shift, and holiday work arises from inadequacy of the contractor's plant or department to perform its total workload on a purely straight-time basis, inclusions in overhead for apportionment to all work of the plant or department, as the case may be, appears appropriate. When particular work, DOE or other, is being specially expedited to a point that its fair share of the contractor's purely straight-time efforts on a single-shift basis will not get the particular job completed within the time desired, direct charging of the related premiums appears appropriate.

(b) When premiums for overtime, shift, and holiday work are charged direct to the work concerned, if the operating overhead of the plant or related department is distributed on the basis of direct labor (cost or hours), the premiums should be excluded from the direct labor base for purposes of the overhead distribution. That is the direct labor base should be, as appropriate, direct labor straight-time costs or direct labor hours actually worked. While the premiums for authorized overtime, shift, and holiday work are acceptable as reimbursable costs, it is generally recognized that direct labor hours worked on an overtime, shift, or holiday basis should participate in indirect costs to the same extent as hours worked on a straight-time basis.

§9-15.5006-2 Outside technical and professional consultants.

Technical and professional consultants, as used here, refers to private individuals acting in their own behalf who make their services available on a fee or per diem basis. It does not refer to employees of firms acting in the firm's behalf whose services may be made available by the firm on, for example, a fixed rate basis. Consultant arrangements may permit bringing to contract work the services of outstanding specialists who would not be available on a full-time basis, or whose employment on a full-time basis would not be economically feasible. Costs of such outside consultant services are normally allowable: Provided, that, the services are essential to and will make a material contribution to the performance of contract work; the services may be performed more economically or more successfully by a consultant than by the contractor's regular personnel; the fee or per diem charged is reasonable; and when approved by the contracting officer. If the cost of such services is charged directly to the DOE contract, the cost of like items properly chargeable only to other work of the contractor must be eliminated from indirect costs allocable to the DOE contract.

§9-15.5006-3 Severance pay.

(a) Severance pay is a payment, in addition to regular salaries and wages but exclusive of payments for vested rights under pension plans, by an organization to personnel whose employment is terminated. Severance pay is allowable as a cost only to the extent that it is required by law, employer-employee agreement, or established policy that constitutes in effect an implied agreement on the contractor's part.

(b) Severance payments are divided into two categories as follows:

(1) Those due to normal, recurring turnover. The actual costs of such payments shall be regarded as expense applicable to the current fiscal year and equitably apportioned to the contractor's activities during that period. Accruals of such normal severance pay will be accept-

able in lieu of actual severance pay if the accruals are reasonable in the light of payments actually made due to normal severance over a representative past period.

(2) Those due to abnormal or mass terminations resulting from abrupt cessation of substantial work and inability of remaining work to afford continuing employment at the same level. The actual costs of such severance payments shall be regarded as expense applicable to the approximate average of the entire periods of employment of the terminated employees and equitably apportioned to the contractor's activities during such average period. (Accruals of such abnormal or mass severance pay are not allowable in view of its conjectural nature.)

(c) It will usually be acceptable to apportion severance payments on the basis of the ratio of total severance payments to a suitable base for the period established pursuant to paragraph (b)(1) or (2) of this section, such as payrolls of all employees, direct salaries and wages, etc. The rate so determined shall be applied to the corresponding element of cost on the individual contracts. The rate should be determined on the basis of the operations of individual activities or other organizational units, such as departments, where such separate computations effect more accurate and equitable results. Severance pay should ordinarily not be considered as directly applicable to any particular contract or contracts. The foregoing applies to cost-type supply and research contracts with commercial organizations.

(d) Subject to paragraph (a) of this section, the following standards apply in determining allowability of costs for severance pay plans of operating contractors:

(1) Payments should be made only upon involuntary termination by reduction in force (RIF) of an employee which results in a permanent separation from the employment of the contractor. However, payments may also be made upon voluntary separation of an employee within a RIF grouping but not otherwise scheduled for termination which thereby eliminates the need for terminating another employee involuntarily.

(2) Payments should not be provided for in the event of (i) temporary layoffs, (ii) employment with a replacement contractor (employer) where continuity of employment with credit for prior length of service is preserved under substantially equal conditions of employment, (iii) early or normal retirement, or (iv) continued employment by the contractor at another facility, subsidiary, affiliate, or parent company of the contractor.

(e) The subject of severance pay with reference to educational institutions is discussed in FPR 1-15.309-36.

§ 9-15.5006-4 Precontract costs.

(a) Precontract costs are those defined in 1-15.205-30 of the Federal Procurement Regulations. To the extent practical, known expenditures of precontract costs should be governed by establishing advance understandings as contemplated by Section 1-15.107 of the FPR. Contracts that include authorized precontract costs shall include the "Date of Incurrence of Cost" clause set forth at 1-7.204-3 of the FPR.

(b) The following limitations apply to establishment of advance understandings relative to precontract costs:

(1) Precontract cost authorizations shall not be used to cover a period in excess of 15 days, unless a longer period is approved by the HPA based upon a written finding that such an allowance is reasonable, and shall not be extended or renewed. A copy of the finding shall be forwarded to the Senior Procurement Official at the time of approval. If prolonged coverage is necessary, a letter contract shall be issued in accordance with DOE-PR 9-3.408.

(2) All precontract cost authorizations shall be reviewed and approved at a management level above the Contracting Officer.

(3) Retroactive precontract cost authorizations and the predating of contractual agreements shall not be used.

(4) Precontract cost authorizations shall not authorize the delivery or furnishing of any goods or services from a contractor until after the contract is executed.

§9-15.5006-5 Plant reconversion costs (See FPR 1-15.205-29)

§9-15.5006-6 Depreciation.

(a) Depreciation is allowable subject to the following:

(1) The charge represents normal depreciation on a contractor's plant, and equipment.

(2) The charge to current operations is a distribution of the cost of acquisition of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset in a systematic and logical manner.

(3) Any generally accepted accounting method consistently applied to the assets concerned having the approval of the Internal Revenue Service for Federal income tax purposes, if subject to the Internal Revenue Code of 1954, as amended, may be used.

(b) Depreciation of the following is unallowable:

(1) Idle or excess facilities (machinery and equipment) other than reasonable standby facilities;

(2) Assets fully amortized or depreciated on the contractor's books;

(3) Unrealized appreciation of values of assets;

(4) Accelerated amortization under Certificates of Necessity or other system in excess of normal depreciation as computed under paragraph (a) of this section.

(c) In entering into contracts involving the use of "special facilities" under section 161 of the Atomic Energy Act of 1954 as amended (section 7 of Public Law 85-681 approved Aug. 19, 1958), the percentage of the total cost of such special facilities devoted to contract performance and chargeable to the DOE should not exceed the ratio between the period of contract deliveries and the anticipated useful life of such facilities.

(d) See FPR 1-15.205-9

§9-15.5006-7 Compensation for personal services.

(a) Definition. Compensation for personal services includes all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees of the contractor during the period of contract performance. It includes, but is not limited to, salaries, wages, directors' and executive committee members' fees, bonuses (including stock bonuses), incentive awards, employee stock options, employee insurance, fringe benefits, and contributions to pension, annuity, management employee incentive compensation plans, and location allowances.

(b) Reasonableness. Compensation is reasonable to the extent that the total amount paid or accrued is comparable to compensation paid for similar work in the private competitive economy in the labor market in which the contractor competes. The application of this basic standard of reasonableness may vary according to the contract situation.

(1) When the contractor is substantially engaged in private competitive business, compensation paid employees on private work will usually be an acceptable standard of comparison for evaluating the reasonableness of compensation paid employees performing similar work under DOE contracts provided that sufficient information is available to the DOE to permit a determination that compensation is, in fact, consistent.

(2) In other contract situations, information on compensation paid elsewhere in the labor market(s) for similar work, usually as measured by compensation surveys found acceptable by the DOE, will be the standard of comparison for evaluating the reasonableness of compensation paid employees engaged in work under DOE contracts.

(3) The standard of comparison (i.e., subparagraph (1) or (2) of this paragraph) for a particular contract situation is determined by the contracting officer after consideration of such factors as the extent and nature of the organization's private competitive business; extent to which contract work would be physically and organizationally integrated with private work; and the contractor's systems for determining, evaluating, and controlling compensation levels.

(4) It is DOE policy that contractors justify the reasonableness of proposed compensation costs and provide to the the contracting officer any supporting information he deems necessary to his evaluation of reasonableness.

(c) Employer contributions to incentive compensation plans for the purpose of establishing a reserve for the payment of incentive compensation for services performed in the future are unallowable.

(d) Fringe benefits are to be treated as allowable provided they meet the following conditions:

(1) The benefits contribute to the performance of contract work and are appropriate for reimbursement from public funds;

(2) DOE has access to all information necessary to complete understanding of the means of computing or determining the extent of the benefits afforded under the various benefit plans.

(3) Appropriate controls are established to assure that employees engaged in work required by the government contract are treated no more or no less favorably than employees in contractor's other operations.

(e) See FPR 1-15.205-6.

§9-15.5006-8 Air travel (See FPR 1-15.205-46)

§9-15.5006-9 Page charges in scientific journals (See FPR 1-15.205-48)

§9-15.5006-10 Special funds in the construction industry.

Costs of special "funds," financed by employer contributions, in the construction industry for such purposes as methods and materials research, public and industry relations, market development, disaster relief, etc., are unallowable except as specifically provided in the contract.

§9-15.5006-11 Employer morale, health, welfare, food service, and dormitory costs. (See FPR 1-15.205-10)

§9-15.5006-12 Procurements or transfers from contractor-controlled sources by certain cost-type contractors (See FPR 1-15.205-22)

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PART 9-16 PROCUREMENT FORMS

§9-16.000 Scope of part.

This part implements FPR Part 1-16 which prescribes the standard forms for use in connection with the procurement of supplies, nonpersonal services, and construction and supplements FPR Part 1-16 by prescribing certain DOE additions to the standard forms which are used for such procurements, and by setting forth DOE outlines for various categories of agreements.

§9-16.050 General policy.

It is the policy of DOE to use standard forms prescribed by FPR Part 1-16 wherever practicable. Uniformity in form and substance tends to insure impartial treatment of all contractors, expedites negotiation and contract review, and facilitates contract administration.

§9-16.051 Deviations.

Deviations in the standard forms set forth in FPR Part 1-16 shall be made only in accordance with §9-1.009 and FPR 1-1.009. Deviations from the outlines in Subpart 9-16.50 may be made, if necessary, in individual cases after review by Counsel.

Subpart 9-16.4 Forms for Advertised Construction Contracts

§9-16.400 Scope of subpart

This subpart prescribes the DOE additions to standard forms prescribed by FPR 1-16.4 for use in procuring construction by formal advertising.

§9-16.404 Terms, conditions, and provisions.

The deletion of the words in clause 5 of Standard Form 23A authorized by FPR 1-16.404(e) shall not be made without the prior approval of the Senior Procurement Official, Headquarters.

§9-16.404-50 DOE additions to Standard Form 19.

(a) Although certain additions to Standard Form 19 are authorized by this section, employing them tends to defeat the purpose of the short form, and careful consideration should be given to the need for any addition before it is included.

(b) The following clauses may be added to Standard Form 19, when applicable:

(1) Security. (§9-7.103-53)

(2) Renegotiation. (§9-7.102-51)

(3) The following wage determination clause:

> The wage rates set forth are the minimum rates which may be paid to the classifications of laborers and mechanics designated therein pursuant to the Davis-Bacon Act (Act of March 3, 1931, as amended; 40 U.S.C. 276a et seq.). DOE does not represent that said minimum wage rates do now, nor that they will at any time in the future, prevail in the locality of the work for such laborers or mechanics; nor that such mechanics or laborers are or will be obtainable at said rates for work under this contract; nor that said rates represent the most recent wage determination by the Secretary of Labor with respect to such classifications of laborers or mechanics in the locality of the work.

§9-16.404-51 DOE additions to Standard Form 20.

The following additions shall be made to Standard Form 20:

> Wage determination. The wage rates set forth are the minimum rates which may be paid to the classifications of laborers and mechanics designated therein pursuant to the Davis-Bacon Act (Act of March 3, 1931, as amended; 40 U.S.C. 276a et seq.). DOE does not represent that said minimum rates do now, nor that they will at any time in the future prevail in the locality of the work for such laborers or mechanics; nor that such mechanics or laborers are or will be obtainable at said rates for work under this contract; nor that said rates represent the most recent wage determination by the Secretary of Labor with respect to such classifications of laborers or mechanics in the locality of the work.

§9-16.404-52 DOE additions to Standard Form 23A.

The DOE clauses to be added to the Standard Form 23A are prescribed in Subpart 9-7.6.

Subpart 9-16.7 Forms for Negotiated Architect-Engineer Contracts

§9-16.700 Scope of subpart.

This subpart describes the administrative terms and additional provisions to be added to Standard Form 252 Architect-Engineer Cost-Reimbursement Contract or DOE Form PR-2 (see sample form contained herein).

§9-16.701-50 Forms prescribed.

The standard forms prescribed by FPR 1-16.7 shall be used to procure architect-engineer services under negotiated fixed-price contracts except as provided in this section. The DOE FORM PR-2 shall be used for cost reimbursement type contracts. The following additional terms shall be included in the Standard Form 252 or DOE Form PR-2. Item 6:

(a) Description of project.

NOTE: As full a description as is feasible should be inserted. If the architect-engineer services are to be furnished for a construction project, describe the facilities involved, including any auxiliary facilities that may be required.

(b) Statement of architect-engineer services. The Contractor shall, within the time specified in the contract, or if not specified therein, in the shortest reasonable time, furnish for the construction project the architect-engineer services described below, subject to such further detailed requirements as may be appended to this contract by agreement of the parties.

NOTE A: This form of contract provides for completion of the architect-engineer services "within the shortest reasonable time." The form may be modified to provide for completion of separable parts of the work at different times.

NOTE B: When title I, II, or III services are to be furnished, the following language may be used to describe such services. Modifications in the text of the language may be made to omit inappropriate items or, where necessary, to meet particular circumstances.

Title I-Preliminary Services

(1) Conduct or arrange for, by subcontract or otherwise as approved by the Contracting Officer, and supervise all necessary topographical and other field surveys, the preparation of maps, necessary test borings, and other surface investigations.

(2) Consult and collaborate with DOE to determine the requirements which will govern the design of the project and to establish architectural and engineering criteria for such design.

(3) Conduct preliminary studies, and prepare preliminary sketches, drawings, layout plans, outline specifications, and reports showing features and characteristics of the design proposed to meet DOE's requirements. If more than three studies, including sketches, drawings, plans, outline specifications, or documents are required because of changes initiated by DOE, an equitable adjustment in the lump-sum compensation will be made in accordance with provisions of the changes article.

(4) The drawings, plans, and outline specifications and documents shall be prepared in such form and furnished in such quantity as directed by DOE.

NOTE: Specific quantities of the drawings, plans, outline specifications, and documents should be indicated here or elsewhere in the contract.

(5) Prepare preliminary estimates of cost and time schedules for (i) completion of the design and working drawings and specifications, and (ii) construction.

(6) Prepare preliminary estimates of material quantities required for construction.

Title II-Design Services

(1) Upon approval by DOE of preliminary plans and estimates, undertake the design of the construction project.

(2) Undertake restudy and redesign work due to minor deviations from the approved preliminary work as may be required by DOE.

(3) Prepare and revise, for the approval of DOE, and furnish complete sets of contract bidding documents, including working drawings, details, and specifications for construction, in such form and quantity and including such provisions as may be required by law or the directions of DOE.

NOTE: Specific quantities of drawings and specifications should be indicated here, or elsewhere in the contract.

(4) Prepare, or when directed by DOE, participate with others in the preparation of a detailed estimate of the cost of a construction based on the approved design and working drawings and specifications.

(5) Assist DOE in securing, analyzing, and evaluating construction bids or proposals.

(6) When requested, consult with and advise DOE on any questions which may arise in connection with the architect-engineer services described in this contract.

Title III-Supervision of Construction

(1) Furnish and maintain governing lines and bench marks to provide horizontal and vertical controls to which construction may be referred.

(2) Check and approve or require revision of, all vendors' shop drawings to assure conformity with the approved design and working drawings and specifications.

(3) Inspect the execution of construction so as to assure adherence to approved working drawings and specifications.

(4) Inspect construction workmanship, materials, and equipment, and report to DOE as to their conformity or nonconformity to the approved working drawings and specifications.

(5) Make or procure such field or laboratory tests of construction workmanship, materials, and equipment, as DOE may require or approve.

(6) Prepare estimates of reasonable amounts of increase or decrease in contract price and/or contract completion time for contract modifications, evaluate proposals submitted by the constructor for such contract adjustments, and make recommendations to the Contracting Officer for use in negotiating.

(7) Prepare reports and make recommendation on status of deliveries or materials and equipment as DOE may require or approve.

(8) Prepare monthly and other reports of the progress of construction, as may be required, and partial, interim, and final estimates and reports of quantities and values of construction work performed, for payment or other purposes.

(9) Furnish ______________ set(s) of reproducible "as-built" record drawings of the type specified by DOE and ______________ set(s) of marked-up specifications, showing construction as actually accomplished.

OMB CONTROL NO.: 1901—0021.

§9-16.703-50 Terms, conditions, and provisions.

The clauses listed in Subpart 9-7.8 shall be added to the Standard Form 253, General Provisions (Architect-Engineer Contract), as prescribed therein.

9-16.7

DOE Form PR-2 (8-78)	U.S. DEPARTMENT OF ENERGY **ARCHITECT-ENGINEER COST-REIMBURSEMENT CONTRACT**	1 CONTRACT NO 2 DATE OF CONTRACT

3 NAME AND ADDRESS OF ARCHITECT-ENGINEER*

4 DEPARTMENT OR AGENCY AND ADDRESS*

5 PROJECT TITLE AND LOCATION

6 CONTRACT FOR (*General description of services to be provided*)

7 CONTRACT AMOUNT (*Express in words and figures*)

8 NEGOTIATION AUTHORITY

9 ADMINISTRATIVE, APPROPRIATION, AND ACCOUNTING DATA

*Include ZIP code, Area code, and Telephone Number

SAMPLE

10. The United States of America (hereinafter called the Government) represented by the Contracting Officer executing this contract and the Architect-Engineer agree to perform this contract in strict accordance with the Articles and the documents identified as follows, all of which are made a part of this contract:

The parties hereto have executed this contract as of the date recorded in Item 2 above

	SIGNATURES	NAMES AND TITLES *(Typed)*
11 ARCHITECT ENGINEER		
A		
B		
C		
D		
12 THE UNITED STATES OF AMERICA		
		Contracting Officer

Subpart 9-16.8 Miscellaneous Forms

§9-16.804 Report on procurement.

§9-16.804-1 General.

The DOE Senior Procurement Official, Headquarters, is responsible for submitting the reports required of DOE by FPR 1-16.804.

§9-16.804-4 Small Business/Labor Surplus Set-Aside Review.

(a) Use of DOE Form 415. Procurement request originators at the Headquarters and Field Activities shall initiate DOE Form 415, Small Business/Labor Surplus Set-Aside Review, with all procurement requests except:

(1) Procurements of $10,000 or less.

(2) Basic research contracts with educational institutions.

(3) Incremental funding, where there is no change in the scope of work.

(4) Unsolicited proposals.

(5) The exercise of options.

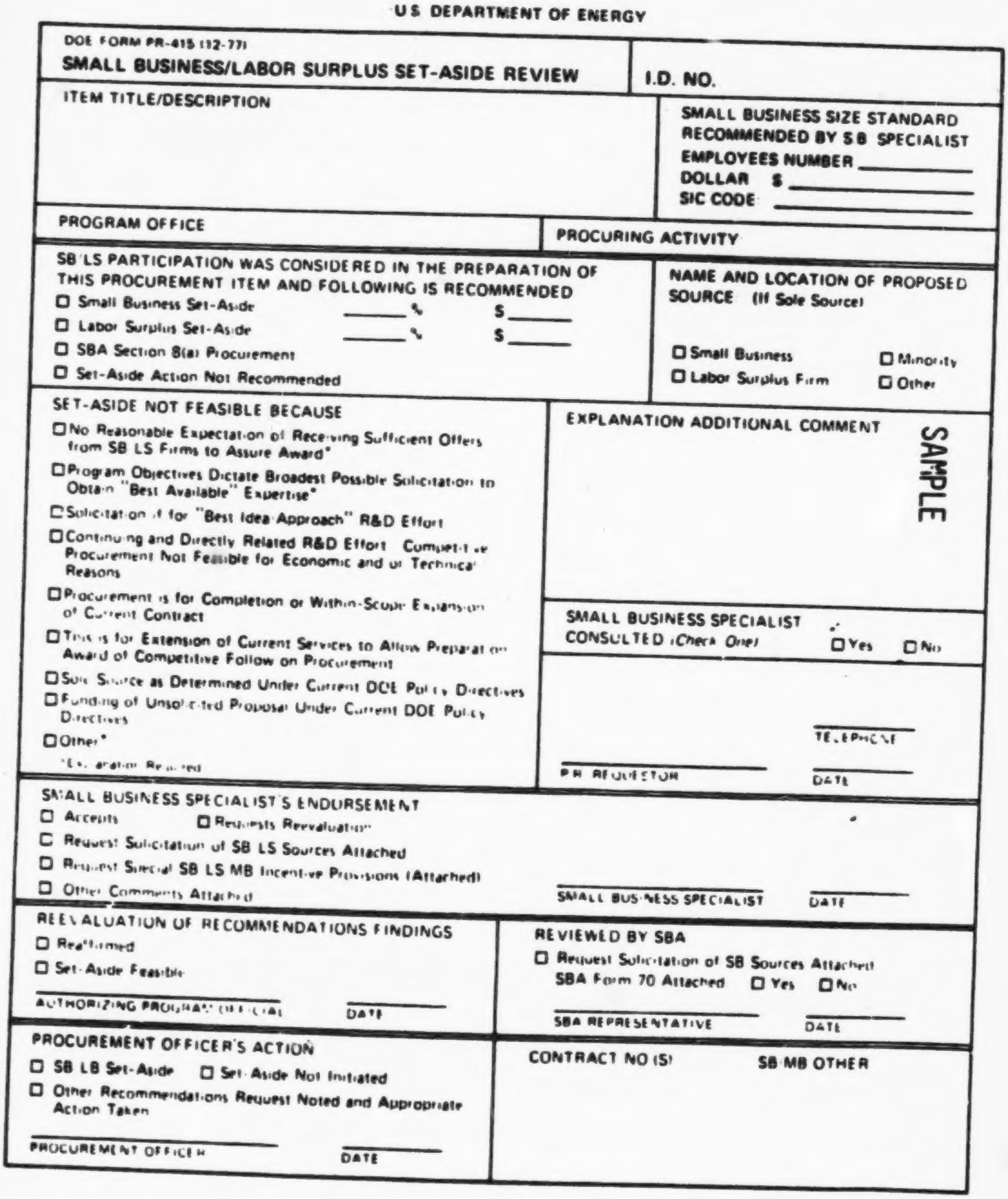
(b) Preparation and Approval Procedures. (1) Responsibility for initiation of DOE Form 415. All applicable procurement requests originating from Headquarters' organizations whether for procurement by Headquarters or Field Activities shall be accompanied by a completed DOE Form 415, initiated by Headquarters' program officials. All applicable procurement requests originating from field organizations shall be accompanied by a DOE Form 415 initiated by the Field Activity program officials.

(2) Responsibility for reviewing procurement requests. The Director, SDBU, or his designee, shall review all procurement requests which are accompanied by a DOE Form 415, originating from Headquarters' organizations in order to determine the feasibility of small business/small disadvantaged business/labor surplus area procurement action. The cognizant field office SB/DB specialist shall review all procurement requests, accompanied by a DOE Form 415, which are originated by the field office.

(c) Requirements. (1) The contracting officer shall review the recommendations on the DOE Form 415 and make the determinations required by FPR 1-1.706.1.

(2) After the form is completed, the procurement documents shall be made available to the cognizant SBA procurement center representative.

(3) Upon award of the contract, one copy of the fully completed Form 415 shall returned to the cognizant SB/DB specialist. In addition, when the award results from a small business set-aside, a copy of the abstract of bids/proposals, including the address and telephone number of the bidders/offerors, shall accompany the Form 415. In all other competitive actions, furnish the name, address and telephone number of the SB/DB firms that were in the competitive range.



U S DEPARTMENT OF ENERGY

DOE FORM PR-415 (12-77)

SMALL BUSINESS/LABOR SURPLUS SET-ASIDE REVIEW

I.D. NO.

ITEM TITLE/DESCRIPTION

SMALL BUSINESS SIZE STANDARD RECOMMENDED BY SB SPECIALIST

EMPLOYEES NUMBER ____________

DOLLAR $ ____________

SIC CODE ____________

PROGRAM OFFICE

PROCURING ACTIVITY

SB/LS PARTICIPATION WAS CONSIDERED IN THE PREPARATION OF THIS PROCUREMENT ITEM AND FOLLOWING IS RECOMMENDED

☐ Small Business Set-Aside ______ % $______

☐ Labor Surplus Set-Aside ______ % $______

☐ SBA Section 8(a) Procurement

☐ Set-Aside Action Not Recommended

NAME AND LOCATION OF PROPOSED SOURCE (If Sole Source)

☐ Small Business ☐ Minority

☐ Labor Surplus Firm ☐ Other

SET-ASIDE NOT FEASIBLE BECAUSE

☐ No Reasonable Expectation of Receiving Sufficient Offers from SB LS Firms to Assure Award*

☐ Program Objectives Dictate Broadest Possible Solicitation to Obtain "Best Available" Expertise*

☐ Solicitation is for "Best Idea Approach" R&D Effort

☐ Continuing and Directly Related R&D Effort Competitive Procurement Not Feasible for Economic and or Technical Reasons

☐ Procurement is for Completion or Within-Scope Expansion of Current Contract

☐ This is for Extension of Current Services to Allow Preparation Award of Competitive Follow on Procurement

☐ Sole Source as Determined Under Current DOE Policy Directives

☐ Funding of Unsolicited Proposal Under Current DOE Policy Directives

☐ Other*

*Explanation Required

EXPLANATION ADDITIONAL COMMENT

SAMPLE

SMALL BUSINESS SPECIALIST CONSULTED *(Check One)* ☐ Yes ☐ No

____________ TELEPHONE

____________ PR REQUESTOR ____________ DATE

SMALL BUSINESS SPECIALIST'S ENDORSEMENT

☐ Accepts ☐ Requests Reevaluation

☐ Request Solicitation of SB LS Sources Attached

☐ Request Special SB LS MB Incentive Provisions (Attached)

☐ Other Comments Attached

____________ SMALL BUSINESS SPECIALIST ____________ DATE

REEVALUATION OF RECOMMENDATIONS FINDINGS

☐ Reaffirmed

☐ Set-Aside Feasible

____________ AUTHORIZING PROGRAM OFFICIAL ____________ DATE

REVIEWED BY SBA

☐ Request Solicitation of SB Sources Attached

SBA Form 70 Attached ☐ Yes ☐ No

____________ SBA REPRESENTATIVE ____________ DATE

PROCUREMENT OFFICER'S ACTION

☐ SB LB Set-Aside ☐ Set-Aside Not Initiated

☐ Other Recommendations Request Noted and Appropriate Action Taken

____________ PROCUREMENT OFFICER ____________ DATE

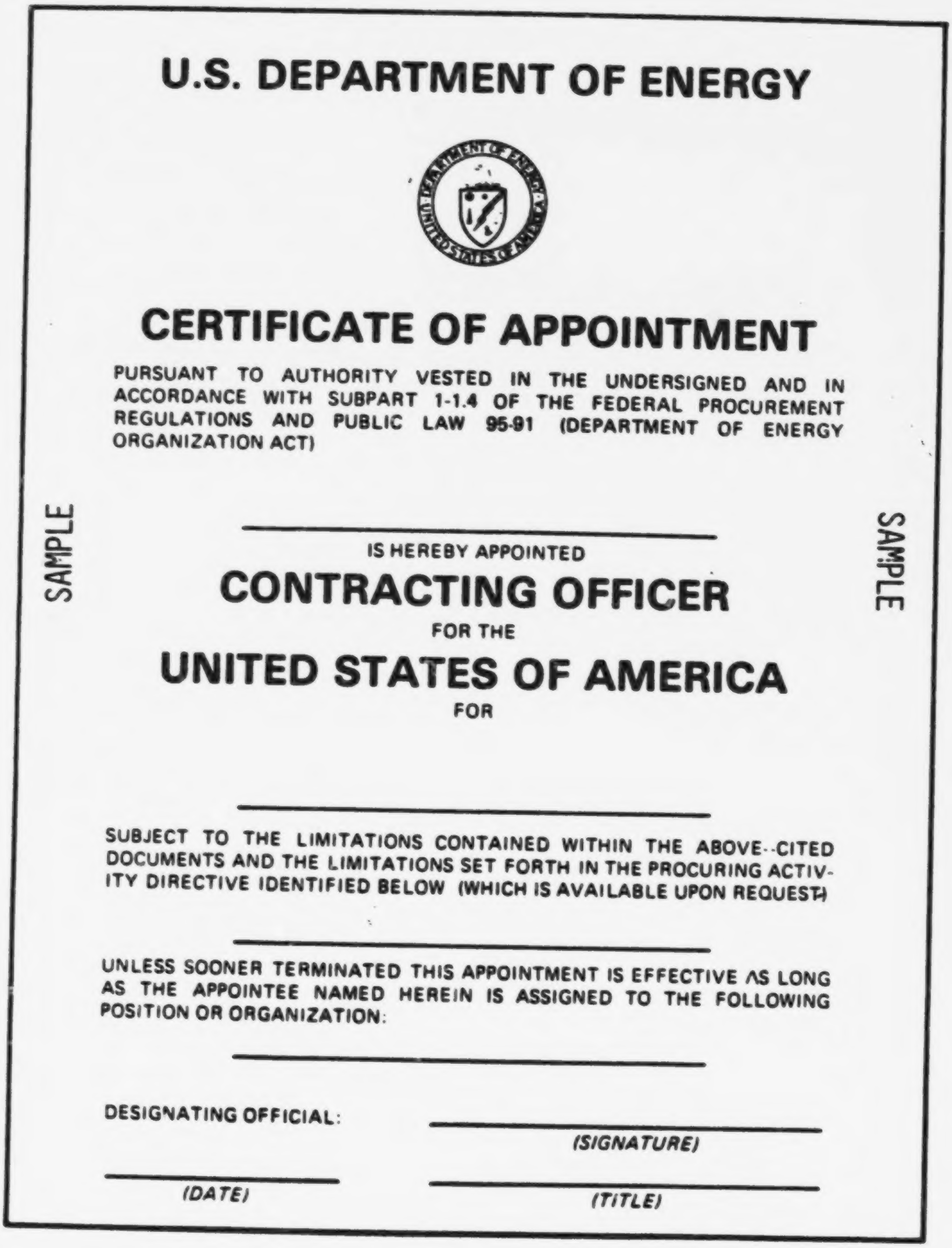
CONTRACT NO (S) SB MB OTHER

§9–16.850 Procurement request form (Reserved).

§9–16.851 DOE Certificate of Appointment

See example next page.

§9-16.851 Certificate of Appointment



SAMPLE

U.S. DEPARTMENT OF ENERGY

CERTIFICATE OF APPOINTMENT

PURSUANT TO AUTHORITY VESTED IN THE UNDERSIGNED AND IN ACCORDANCE WITH SUBPART 1-1.4 OF THE FEDERAL PROCUREMENT REGULATIONS AND PUBLIC LAW 95-91 (DEPARTMENT OF ENERGY ORGANIZATION ACT)

IS HEREBY APPOINTED

CONTRACTING OFFICER

FOR THE

UNITED STATES OF AMERICA

FOR

SUBJECT TO THE LIMITATIONS CONTAINED WITHIN THE ABOVE-CITED DOCUMENTS AND THE LIMITATIONS SET FORTH IN THE PROCURING ACTIVITY DIRECTIVE IDENTIFIED BELOW (WHICH IS AVAILABLE UPON REQUEST)

UNLESS SOONER TERMINATED THIS APPOINTMENT IS EFFECTIVE AS LONG AS THE APPOINTEE NAMED HEREIN IS ASSIGNED TO THE FOLLOWING POSITION OR ORGANIZATION:

DESIGNATING OFFICIAL:

(SIGNATURE)

(DATE)

(TITLE)

SAMPLE

Subpart 9-16.50 Contract Outlines

§9-16.5000 Scope of subpart.

This subpart contains outlines for certain categories of agreements and contracts.

§9-16.5001 Applicability.

The contract outlines set forth herein are applicable to procurements within the scope of the various categories covered by the outlines.

§9-16.5002 Contract outlines.

The outlines in this section provide a format, text, and arrangement for a ready source of reference. The outlines are suggested as models. As such, they may be modified locally to meet the circumstances of a particular procurement without being subject to §9-16.051.

§9-16.5002-1 Special research contracts (SRC) with educational institutions.

Contract No. ______________________________ __________

This contract is effective as of the ____________________, 19____, between the United States of America (hereinafter referred to as the "Government"), acting through the U. S Department of Energy (hereinafter referred to as the "DOE"), and ______________________________ (hereinafter referred to as the "Contractor").

Recitals

DOE wishes to have the Contractor perform certain research. This contract states the terms and conditions under which the Contractor agrees to perform the work.

This contract is authorized by the Department of Energy Organization Act of 1977 and other applicable law.

Agreement

Now therefore, the parties hereto agree as follows:

Article I — The Research To Be Performed

(a) The Contractor shall furnish personnel, facilities, equipment, materials, supplies, and services, except such as are furnished by the Government, necessary for the performance of the research provided for in Appendix A and shall perform the research and report thereon pursuant to the provisions of this contract. It is understood that Appendix A, a guide to the performance of this contract, may be deviated from by the Contractor subject to the specific requirements of this contract.

(b) This work shall be conducted under the direction of __________ or such other member of the Contractor's staff as may be mutually satisfactory to the parties.

NOTE A. The description of the research in Appendix A may be omitted and Appendix A appropriately modified to incorporate, by pertinent references to the proposal or other documents, the type of data necessary to describe the research as called for by Appendix A; and where there is no cost sharing, other features may be referenced in lieu of insertion in Appendix A. In such cases, the referenced material will be retained as part of the permanent contract file.

Article II-The Period for Performance

The period of performance under this contract shall commence on________________________________ 19______________and expire on_______________19_______________. Performance may be extended for additional periods by the mutual written agreement of the parties. It is presently expected that this contract will be extended by mutual agreement until_____________________19____________________,[1]

Article III-Consideration

(a) In full consideration of the Contractor's performance hereunder, DOE shall furnish the equipment, supplies, materials, and services, if any, listed in Article A–11(b)(2) and pay the Contractor the sum of $______________________, hereinafter called the Government "Ceiling" which sum shall be subject to adjustments as hereinafter provided.

(b) Payments to the Contractor shall equal the "cumulative Government cost" of performance of this contract, as the term "cumulative Government cost" is defined in Article B-XXIX[2], provided however, and notwithstanding any other provision of this contract, that the Government's monetary liability under this contract shall not exceed the Government ceiling or an amount equal to the cumulative Government cost, whichever is less. The Contractor shall be obligated to perform under this contract throughout the agreed-upon period of performance, and to bear all costs which DOE has not agreed to pay, provided however, that the Contractor shall have the right to cease to perform the research provided for in this contract, upon written notice to DOE to that effect, at any time, when or after the cumulative Government cost equals or exceeds the Government ceiling.

(c) The Government ceiling specified in (a) above may be increased unilaterally by DOE by written notice to the Contractor and may be increased or decreased by written agreement of the parties (whether or not by formal modification to this contract). In the event the stated period of performance is extended, the Government ceiling will be revised to reflect any increased DOE funding for the extended period or periods.

(d) Upon termination or expiration of the total period of performance, the Contractor shall promptly refund to DOE (or make such disposition as DOE may in writing direct) any sums paid by DOE to the Contractor under this contract, through direct payment or under letter of credit, in excess of the cumulative Government cost incurred in performance under the contract.

Article IV-Government Property

The following items of property procured or fabricated by the Contractor are hereby listed as "Government Property." (List all property and equipment, title to which is to remain in the Government. Insert the word "none" if title to all of the property is to be vested in the Contractor. If title to property procured or fabricated by the Contractor is to remain in the Government, add appropriate provisions for payment for such property from plant and equipment funds. Such funds should be in addition to, and not a part of, the "Government Ceiling" funds provided under Article III).

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[1] This sentence is optional and may be omitted.

[2] The term cumulative Government cost refers to the cost of items under A-II(a) of Appendix A, for the initial contract period plus any extension period that may be properly chargeable to DOE. If proportionate cost sharing is involved, the cost is DOE's share of such costs, and does not include the cost of items excluded from Article II-(a), such as items to be contributed solely by the Contractor or property to be furnished by the Government. Charges to DOE will be reported after the conclusion of each contract period set forth in Appendix A (generally an annual period); in addition to the limitations on charges to DOE provided for by this Article III, charges to DOE for a specified contract period may not exceed the 110 percent limitation mentioned above as well as to the provisions of this Article III.

Article V-Appendices

Appendix A, Appendix B – General Provisions, and Appendix C Statement of Costs, are hereby attached to and made a part of this contract.

In witness whereof, the parties have executed this contract.

United States of America

By ______________________________

____

(Title)

Department of Energy

____

(Contractor)

By ______________________________

(Title)

Contract No. ______________________________

Appendix A

Contractor ____

Contract No. ____

For the contract period ____________________ through ____________________.

Article A-I. Research to be performed by the Contractor. (Insert description of research activity and state the appropriate percentage of time or effort which the principal investigator(s) expects to devote to the work.)

Article A-II. Ways and means of performance. The listing under (a), (b), and (c) below should be in a form to permit determination of which items of cost are to be chargeable to DOE or proportionately shared, and which items are to be contributed solely by the Contractor or solely by DOE. The listing should also permit application of the approval requirements of the contract. Excessive detail in listing should be avoided.

(a) Items for which funding will be provided as indicated in A-III below. Do not include in this paragraph (a) any items which are to be contributed solely by the Contractor. See §9–4.5107–1(d).

(1) Salaries and wages. State total dollar amount. If any stipulated salary support amounts for professional staff members are established in accordance with §9–4.5106–4, the stipulated amounts, along with any limitations or requirements on the use of such stipulated amounts (see §9–4.5106–4(c)) should be provided for in the contract.

(2) Equipment to be purchased or fabricated by the Contractor. List equipment to be purchased or fabricated by the Contractor and for which title is to remain in the Contractor and state the total dollar amount budgeted for such equipment. Such equipment may be set forth in general classifications as specifically as possible, if it is not feasible to list them individually. However, any individual piece of equipment, the estimated cost of which is over $1,000 will be separately identified. Except where the contract may otherwise specifically provide, equipment for the purpose of this paragraph A-II shall mean an item of personal property having a useful life expectancy in excess of 1 year and an acquisition cost in excess of $300.

(3) Travel. (Show amounts for both foreign and domestic. If none, state none).

Domestic____________________

Foreign____________________

(4) Other direct costs.

(5) Indirect costs based on a predetermined rate of ______ percent based on contractor fiscal year(s). Show factor or factors of cost to which rate applies – generally direct salaries and wages.

(b) Items, if any, significant to the performance of this contract, but excluded from computation of Government cost and from consideration in proportioning costs. (See §9–4.5107–2(c).)

(1) Items to be contributed by the Contractor. In accordance with Article B-II(c), if a proposed Contractor contribution is included in this paragraph (b)(1), the Contractor shall maintain records adequate to permit DOE to determine the extent of the contribution. If the time or effort of the principal investigator(s) is to be contributed by the Contractor and excluded from A-II(a) and A-II(b), the contributed time or effort should be listed under A-II(c).

(2) Items to be contributed by the Government.

(c) Time or effort of principal investigator(s) contributed by Contractor but excluded from computation of Government cost and from consideration in proportioning costs. Where covered under A-II(a) or A-II(b)(1) above, state: "None". See §9-4.5107-1(e).

Article A-III. The total estimated cost of items under A-II(a) above for the contract period stated in this Appendix A is $_______________. DOE will pay ____________________ percent of the actual costs of these items incurred during the contract period stated in the Appendix A, subject to the provisions of Article III and Article B-XXIX. The estimated Government cost for the contract period stated in this Appendix A is $____________________.

The estimated Government cost is funded as follows:

(a) Estimated unexpended balance from the prior period(s) .... $__________.

(b) New funds for the current period.. $__________.

The new funds being added in A-III(b) constitute the basis for advance payments provided under Article B-XI.

(c) Subject to their availability, additional funds anticipated for the contract $———.

Note: Do not include this provision in fully funded SRCs.

Appendix B-General Provisions

For the contract period____________________________through____________________________.

Article B-I-Definitions

(a) The term "DOE" means the U.S. Department of Energy or any duly authorized representative thereof, including the Contracting Officer except for the purpose of deciding an appeal under the article entitled "Disputes."

(b) The term "Contracting Officer" means an official designated to enter into or administer contracts and make related determinations and findings.

(c) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

Article B-II-Inspection, Reports, Records, and Accounts[1]

(a) DOE shall have the right to inspect, in such manner and at all reasonable times as it deems appropriate, all activities of the Contractor arising in the course of its undertakings under this contract.

(b) The Contractor shall make progress and other reports in such manner and at such times as specified in Article B-XXI. The Contractor shall also make such other reports to DOE with respect to its activities under this contract, as DOE may reasonably require from time to time.

(c) The Contractor agrees to keep records and books of account, in accordance with generally accepted accounting principles and practices, and consistent with the requirements of OMB Circular A–21, and FPR 1–15.3 as constituted on the effective commencement date of the contract period, covering its costs and expenditures for items included under Article A-II(a) of Appendix A and which are in furtherance of the research work under this contract. In the event a contractor contribution is listed in Article A-II(b), the Contractor shall maintain records adequate to permit DOE to determine the extent of the contribution. If professional staff members are included under Article A-II(b), the Contractor shall maintain records on such personnel in accordance with the payroll distribution procedure of section J.6 of OMB Circular A–21.

(d) DOE shall at all reasonable times be afforded access to the premises and to these books and records and to related correspondence receipts, vouchers, memoranda, and other data of the Contractor; and the Contractor shall preserve such books and papers, without additional compensation therefor, in accordance with the retention requirements referenced in Article B-XVII, Examination of Records.

---

[1] If the contract is with a not-for-profit organization other than an educational institution, this article should be revised to provide that the cost principals FPR 1–15.2, 1–15.6, or 1–15.7 as may be modified by DOE PR 9–15 depending on the nature of the Contractor's organization, will be used in determining actual cost.

Article B-IV-Disclosure of Information:

This clause should be used in place of the clauses entitled "Security", §9–7.103–53, and "Classification" §9–7.103–50, in SRCs with educational institutions for off-site research that are not likely to produce Restricted Data or other classified information.

Disclosure of Information:

(a) It is mutually expected that the activities under this contract will not involve Restricted Data or other classified information or material. It is understood, however, that if in the opinion of either party, this expectation changes prior to the expiration or termination of all activities under this contract, said party shall notify the other party accordingly in writing without delay. In any event, the Contractor shall classify, safeguard, and otherwise act with respect to all Restricted Data and other classified information and material, in accordance with applicable law and the requirements of DOE, and shall promptly inform DOE in writing if and when Restricted Data or other classified information or material becomes involved. If and when Restricted Data or other classified information or material becomes involved, the

Contractor shall have the right to terminate performance of the work under this contract and in such event the provisions of this contract respecting termination for the convenience of the Government shall apply.

(b) The Contractor shall not permit any individual to have access to Restricted Data, or other classified information, except in accordance with the Atomic Energy Act of 1954, as amended, and DOE regulations or requirements.

(c) The term "Restricted Data" as used in this article means all data concerning the design, manufacture, or utilization of atomic weapons, the production of special nuclear material or the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act of 1954, as amended.

Article B-V-Responsibility For The Work

(a) The Contractor is solely responsible for the conduct of the work.

(b) In instances where the carrying out of the work involves a DOE license, the provisions of the pertinent license shall prevail over any inconsistent provisions of this contract.

Article B-VI Reserved

Article B-VII-Rights in Technical Data (Short Form)

Insert the clause in §9-9.202-3(g)(2).

Article B-VIII-Patent Rights (Short Form)

Insert the clause in §9-9.107-6.

Article B-IX-Property Items

(a) Except as otherwise provided in this paragraph (a) and paragraph (b) of this Article B-IX, title to all material, supplies, and equipment purchased or otherwise acquired by the Contractor in the performance of its research activities shall be and remain in the Contractor. Said materials, supplies, and equipment shall be used for the benefit of research under this contract and any extensions or successor contractors hereto; and provided there is no interference with said research, shall be made available for use by investigators working on any Federal research contract at the same location. Subject to these priorities, materials, supplies, and equipment may be used as the Contractor wishes. Except as otherwise agreed in writing, title to any items of property listed as "Government property" shall pass directly to the Government; such property shall be subject to paragraphs (b), (c), (d), (e), and (f) of this Article B-IX.

(b) Subject to the mutual agreement of DOE and the Contractor, the Government may furnish the Contractor items of equipment, materials, supplies or facilities for use by the Contractor in the performance of the work; title to these items shall remain in the Government unless otherwise agreed in writing. Such items of property and the items of property listed elsewhere in this contract as Government property, are hereinafter referred to as "Government property". Title to Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government nor shall any such property, or any part thereof, be or become a fixture or lose its identity as property by reason of affixation to any realty.

(c) To the extent practicable, the Contractor shall cause all items of Government property to be suitably marked with an identifying mark or symbol indicating that the items are the property of the Government. The Contractor shall maintain, at all times and in a manner satisfactory to DOE, records showing the use and disposition of Government property. Such records shall be subject to DOE inspection at all reasonable times and DOE shall at all reasonable times have access to the premises wherein any items of Government property are located. Unless otherwise authorized in writing by DOE, the Contractor shall use Government property only for the purposes of this contract, provided, however, that the Contractor is hereby authorized to use items of equipment constituting Government property for other

Federal research contracts to the extent such use: (1) does not interfere with its work under this contract; (2) is not prohibited by provisions of the other Federal agreements; and (3) is promptly reported by the Contractor to DOE under this contract.

(d) The Contractor shall promptly notify DOE of any loss or destruction of or damage to Government property. It is understood that the Contractor shall not be liable for any such loss, destruction, or damage, unless same results from willful misconduct or lack of good faith on the part of any corporate officer of the Contractor, or of one or more of the Contractor's representatives having supervision or direction of all or substantially all of the activities under this contract. If the Contractor is liable for any such loss, destruction, or damage, it shall promptly account therefor to the satisfaction of DOE; if the Contractor is not liable therefor, and is indemnified, reimbursed, or otherwise compensated for such loss, destruction, or damage, it shall promptly account therefor to the satisfaction of DOE.

(e) With the written approval of DOE, the Contractor may sell, transfer, or otherwise dispose of items of Government property to such parties and upon such terms as so approved, or itself acquire title to items of Government property upon such terms as may mutually be agreed upon in writing by the Contractor and DOE. The proceeds of any such disposition, and any agreed price of any such Contractor acquisition, shall be paid by the Contractor to the Government, or credited on account of DOE, payments to be made under this contract as DOE may direct. Subject to the other provisions of this contract, the Contractor shall deliver Government property to DOE upon request (suitably packed and shipped at the Government's expense).

(f) The Contractor shall utilize for the benefit of the work under this contract such items of property available to the Contractor by reason of its activities under other Federal research agreements as are appropriate for utilization under this Contract pursuant to the provisions of the pertinent Federal agreements.

Article B-X-Termination For Convenience Of The Government

Insert the requirements of FPR 1–8.704–1.

Article B-XI-Payments

(a) DOE shall make payments to the Contractor with respect to the amount of consideration prescribed in Article III of this contract as follows:

(1) A maximum of 45 percent of the new funds as set forth in Article A–III(b) of the contract following execution of the contract (and following the effectuation of each extended period) upon receipt of a request or requests in writing from the contractor.

(2) A maximum of an additional 45 percent of the new funds as set forth in Article A-III(b) of this contract upon receipt of a request or requests from the Contractor evidencing that the amount requested is then required in connection with the work under the contract.

NOTE: Subparagraphs (1) and (2) of this paragraph (a) may be revised, as deemed appropriate by the field office, in accordance with §9-4.5112-3(a).

(3) If, following submission of an annual progress report, the contract is to be extended for an additional period of performance, an additional payment may be made at the time of execution of the extension which, when added to the payments already made under (1) and (2) above for the expiring period, will not exceed the new funds set forth in Article A-III(b) for the expiring period. A concluding payment for the pertinent period, if appropriate, may be made following submission of a certified statement showing Government cost and evidencing the Contractor's performance under the contract.

(4) If the contract is not to be extended, the final payment of the consideration provided for in Article III shall be made following submission by the Contractor of a final report required by Article B-XXI, in form and content satisfactory to DOE, and submission of a certified statement showing Government cost and evidencing the Contractor's performance and compliance with the patent provisions.

(b) The payments made pursuant to paragraph (a) above shall not prejudice or otherwise affect adversely any of the Government's rights under the contract. For purposes of settlement in the event of termination pursuant to Article B-X hereof, these payments shall not be construed as evidentiary, and any excess payment in the light of Article B-X shall be promptly returned to DOE.

(c) DOE, at its option, may invoke the following with respect to any amount of consideration remaining to be paid at any given time:

(1) DOE shall issue a letter of credit as provided for by Treasury Fiscal Requirements Manual, Part 6 Chapter 2000 under which payments to the Contractor with respect to the amount of consideration provided for in Article III be made. The Contractor agrees that the first ninety (90) percent of the new funds as set forth in Article A-III(b) will be under the letter of credit and will be subject to the submission by the Contractor of a Payment Voucher on Letter of Credit (TUS 5401), in accordance with procedures based upon Treasury Fiscal Requirements Manual, Part 6 Chapter 2000 which are agreed to by the parties. Following submission by the Contractor of a final report provided for in Article B-XXI, in form and content satisfactory to DOE, and submission of a certified statement showing the total expenditures and evidencing the Contractor's performance, and upon submission by the Contractor to DOE of such invoices or vouchers as are satisfactory to DOE, DOE shall pay the Contractor the concluding payment of the consideration provided for in Article III: or said concluding payment will be included under the letter of credit and will be subject to submission by the Contractor of a payment voucher on letter of credit, in accordance with the procedure described above. If, following submission of an annual report, the contract is extended for an additional period of performance, an additional payment may similarly be made at the time of execution of the extension which, when added to the payments already made for the expiring period, will not exceed the new funds as set forth in Article A-III(b) for the expiring period. A concluding payment for the pertinent period, if appropriate, may be made following submission of a certified statement showing Government cost for the pertinent period and evidencing the Contractor's performance.

(2) DOE reserves the right to increase, decrease, or cancel the amount covered by the letter of credit, provided that such action is required because of a change in the amount of consideration provided for in Article III or is taken pursuant to paragraph (c)(1) of this article. The issuance and use of a letter of credit and receipt of funds pursuant thereto shall not prejudice or otherwise adversely affect any of the Government's rights under the agreement.

Article B-XII-Equal Opportunity

Insert FPR 1-12.803-2.

Article B-XIII-Convict Labor

Insert FPR 1-12.204.

Article B-XIV-Contract Work Hours Standards Act-Overtime Compensation

Insert the clause set forth in FPR 1-12.303.

Article B-XV-Disputes

Insert the clause in DOE-PR 9-7.802-5.

Article B-XVI-Officials Not To Benefit

Insert the clause in FPR 1-7.102-17.

Article B-XVII-Covenant Against Contingent Fees

Insert the clause in FPR 1-1.503.

Article B-XVIII-Examination of Records

Insert FPR 1-7.103-3 as modified in §9-7.103-3. The Examination of Records clause in FPR 1-7.103-3 as modified by §9-7.103-3 may be omitted from foreign contracts in accordance with procedures in FPR 1-6.10.

Article XIX-Buy American Act

Insert the clause in FPR 1-7.102-14.

Article B-XX-Assignment: Subcontracting

Neither this contract nor any interest therein nor claim thereunder shall be assigned or transferred by the Contractor, except as expressly authorized in writing by the Contracting Officer. The contractor shall not subcontract any research or development work under this contract, except as expressly authorized in writing by the Contracting Officer.

Article B-XXI-Reports and Renewal Proposals

The Contractor shall furnish six (6) copies of the following reports to the appropriate field office.

(a) Progress report. The progress report shall briefly describe the scope of investigations undertaken and the significant results obtained. It shall also indicate compliance with the contract requirements and any failures to comply. The report shall indicate the approximate percentage of time or effort which the principal investigator(s) has devoted to the project since the beginning of the current term of the contract and indicate the amount of effort which is expected to be devoted during the remainder of the current term. Technical reports, preprints, and articles prepared for publication shall be listed with bibliographical references. Reprints of all such material not previously submitted shall be appended and material contained therein need not be duplicated in the report. Progress reports shall be submitted approximately 4 months in advance of the expiration of the current contract term and shall give the Contractor's best estimate of the probable events and occurrences in regard to the remainder of the current term. Except as DOE may otherwise request, no further progress report will be required for any contract year, unless there has been a significant change in scientific results or compliance between the latest progress report by the contractor and its actual experience which shall be reported promptly.

(b) Final report. Upon termination or expiration of the total period of performance, the Contractor shall submit, promptly, a summary of its activities for the entire period, including a list of publications issued during the entire period and copies of any reprints not previously submitted, as well as a comprehensive evaluation of progress in the area of research funded by the contract.

(c) Renewal proposals. A renewal proposal, if any, shall be submitted along with the technical progress report, and each of the two documents shall be separately bound. Renewal proposals are submitted to the DOE field office that is administering this contract.

Article B-XXII-Foreign Travel

Foreign travel shall be subject to the prior approval of the Contracting Officer for each separate trip, regardless of whether funds for such travel are contained in an approved budget. Foreign travel is defined as any travel outside of Canada and the United States and its territories and possessions.

Article B-XXII-(Reserved)

Article B-XXIV-Utilization Of Labor Surplus Area Concerns

Insert the clause in FPR 1-1.805-3(a) under the conditions prescribed therein.

Article B-XXV-Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals.

Insert the clause in FPR Temporary Regulation 50.

Article B-XXVI-(Reserved)

Article B-XXVII-Soviet-Bloc Controls

Insert the clause set forth in §9-7.304-52 under the conditions prescribed therein.

Article B-XXVIII-Disabled Veterans and Veterans of the Viet Nam Era

Insert the clause in FPR Temporary Regulation 39.

Article B-XXIX-Determination of Government Costs

[1](a) The term "Government cost" as used in this contract means DOE'S share[2] of the sum of costs incurred by the Contractor for items included under Article A-11(a) of Appendix A in furtherance of the work hereunder, incurred in accordance with the provisions of this contract, and which are reported to DOE in accordance with (b) below. The term "cumulative Government cost" as used in this contract means the total of the Government cost incurred during the initial contract period plus any extension periods.

(b) Within 3 months after the end of each contract period set forth in Appendix A, and within 3 months after the termination or expiration of the total period of performance, the Contractor shall furnish a certified statement, executed by an official of the Contractor showing the Contractor's cost and evidencing its performance under the contract, during the contract term just completed. The statement shall show all costs incurred during the pertinent contract term set forth in Appendix A for items under Article A-II (a) of Appendix A, including the Contractor's share, if any, of such costs, and show the extent of the Contractor's contribution of items listed under Article A-II(b)(1) of Appendix A. Costs included in the certified statement may include the following: expenditures of cash, the cost of material and supplies transferred from store's inventory, and the amount due the Contractor for indirect costs in accordance with the rate and factor or factors shown in Appendix A of the contract for the pertinent period. The costs for the pertinent period shall be consistent with the principles of OMB Circular A-21 as constituted as of the effective commencement date of said period. The certified statement shall be in the form set forth in Appendix C.

(c) The certified statement should be in agreement with the institution's financial record and shall reflect only expenditures actually made during the period covered, including transfers from inventory. It shall not include commitments as a part of such expenditures for goods or services on order but not received or those received but not paid for, unless the Contractor is operating under an established and consistently applied system of actual accounting. If this is the case, the certified statement shall be so footnoted. A combination of accrual and cash accounting for cost accumulation and reporting purposes shall not be used. The renewal proposal budget should be footnoted to show the estimated amount of outstanding commitments for property at the end of the current period. The certified statement contains a space in which should be inserted the actual amount of outstanding commitments for property at the end of the period covered by the statement. This commitment amount is for information only and is not a part of the expenditure calculation. The Contractor understands that DOE expects to rely on this certified statement for determining the Government cost for the period. With respect to any period in which proportionate cost sharing is applicable, the support cost for the pertinent period will be determined by applying the percentage figure included in Article A-III for the pertinent period to the certified cost of items included under Article A-II(a) incurred during the pertinent period. All charges to DOE shall be subject to the approval requirements of this contract. The Contractor is expected to maintain auditable records as contemplated by Article B-II(c) to substantiate the costs incurred for items under Article A-II(a) and to show the extent of the Contractor's contribution of the items listed under Article A-II(b)(i).

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[1] If the contract is with a not-for-profit organization other than an educational institution or a research foundation established by an education institution, this article should be revised to provide that the commercial cost principles (FPR 1-15.2) will be used in determining actual cost.

[2] In those cases in which there is no proportionate sharing of costs, DOE'S "share" will be 100 percent. With respect to any period in which proportionate cost sharing is applicable pursuant to Article A-III, it is understood that the Government cost for that specified period will equal the stipulated percent of the sum of costs incurred by the Contractor during the stated period for items under A-II(a) of Appendix A, not shown in Appendix A of the contract for the pertinent period. The costs for the pertinent period shall be consistent with the principles of OMB Circular A-21 and FPR 1-15.3 as constituted on the effective commencement date of said period. The certified statement shall be in the form set forth in Appendix C.

Article B-XXX—Additional Approvals

In addition to such approvals as are specifically required by other provisions of this contract, the Contractor shall obtain DOE's approval for:

(a) A change of the principal investigator, co-investigator, or other key people as might be named in this contract or continuation of the research work for any one period in excess of 3 months without direction by an approved principal investigator. The principal investigator may increase or decrease the amount of effort which he devotes to the project without obtaining DOE approval; however, a representative of the institution shall consult with the appropriate DOE Headquarters program representative if the principal investigator plans to, or becomes aware that he will devote substantially less effort to the work than anticipated in Article A-1. The purpose of such consultation will be to determine what effect, if any, the anticipated change will have on the research work and what modification to the contract, if any, may be appropriate.

(b) No change in the phenomenon or phenomena under study, i.e., broad category of the research under the contract, shall be made without the specific written approval of the Contracting Officer. Ordinarily, such changes, if approved by the Contracting Officer, will be accomplished through a new contract or a mutually agreed to modification. The Contractor may change the specific objectives in the research work described in the contract, provided it gives the Contracting Officer prompt notification of such changes, and the Contractor may continue to follow the new objectives while DOE determines whether it wishes to continue the program under the changed approach. Significant changes in methods or procedures employed in performing the research should be reported in the first technical progress report issued subsequent to the changes.

(c) Prior Approval is required. Acquisition of an item of equipment not itemized in Appendix A, the cost of which is $1,000 or more. Approval is not required if the equipment is merely a different model of an item listed in Appendix A.

(If plant and capital equipment funds are provided for the acquisition of equipment with title to be vested in the Government, the total cost of such equipment shall not exceed the amount provided for such equipment unless prior DOE approval has been obtained.)

(d) Prior approval is required. Purchase of any general-purpose equipment, such as office equipment or furniture, air conditioning, automatic data processing equipment, etc., not specifically provided for in Appendix A.

(e) Incurring costs for items set forth in Article A-II(a), during the pertinent contract period stated in Appendix A, in excess of 110 percent of the total estimated cost specified in Article A-III. Charges to DOE for any such costs incurred with the approval of DOE shall also be subject to the limitations of Article A-III.

(f) Any proposed foreign travel (see Article B-XXII).

(g) Prior approval is required. Expenditure for domestic travel if such expenditures exceed the amount shown in Article A-II(a) for such travel by $500 or by 25 percent, whichever is greater.

(h) Acquisition of excess personal property.

Article B-XXXI-Payment Of Interest On Contractors' Claims

(Reserved)

Article B-XXXII-Clean Air and Water

Insert the clause in FPR 1-1.2302-2 under the conditions set forth therein.

Article B-XXXIII-Employment of the Handicapped

Insert the clause set forth in FPR 1-12.1304-1 under the conditions set forth in the section.

Article B-XXXIV-Security

Insert the clause in §9-7.103-53 under the conditions set forth therein.

Article B-XXXV-Classification

Insert the clause in §9-7.103-50 under the conditions set forth therein.

Article B-XXXVI-Preference for U.S. Flag Air Carriers

Insert the clause in FPR 1-1.323-2 under the conditions set forth in FPR 1-1.323.

Article B-XXXVII-Preservation of Individual Occupational Radiation Exposure Records.

Insert the clause set forth in §9-50.704-41 where appropriate.

Article B-XXXVIII-Use of U.S. Flag Commercial Vessels

Insert the clause in FPR 1-19.108-2 under the conditions set forth therein.

Appendix C

Statement of Costs

1. Name and address of Contractor: ______________________________

2. Contract number: ______________________________

3. Beginning and ending date of pertinent contract period: ______________

4. Costs incurred during the pertinent contract period. (List only those costs which are to be reimbursed by DOE or proportionately shared by the parties in accordance with Article A-II(a) and Article A-III.)

Cost Categories[1]	Amount
a. Salaries and wages	$__________
b. Equipment (List separately in the cost of each piece the equipment separately listed in Appendix A to the agreement or for which separate approval was obtained from DOE.)	$__________
c. Travel (Show amounts for both foriegn and domestic. If none, state none.)	$__________
Domestic	$__________
Foreign	$__________
d. Other direct costs	$__________
e. Total direct expenditures	$__________
f. Indirect charges (Indicate percent and expenditures to which percent is applied.)	$__________

5. Total costs for items under Article A-II(a) for pertinent period .... $__________

6. Government cost for the pertinent period set forth in Appendix A, as defined in Article B-XXIX, chargeable to DOE for the pertinent period (percent of total costs using percent shown in Article A-III of Appendix A) for pertinent period of .... $__________

7. Cumulative Government cost (Government cost under this statement plus Government cost for previous periods .... $__________

8. Accumulated Government ceiling in Article III .... $__________

9. The difference between lines 7 and 8 .... $______________

10. Provide information regarding contributions by the Contractor of items listed in Article A-II(b) of Appendix A during pertinent period. State the extent of the Contractor's actual contribution, the measure of such contributions should be in the same terms as the Contractor's commitment under Article A-II(b), e.g., time, dollar, etc. .... $______________

11. Actual outstanding commitments for property at the end of the period covered by this statement .... $______________

I hereby certify that this report is true and correct to the best of my knowledge and belief and that the costs listed herein were incurred in connection with the performance of the research provided for under this contract and in accordance with the terms and conditions set forth therein.

(Name and Title of an Authorized Representative)

____

____

(Signature) (Date)

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[1] The listing of categories should be consistent with the itemization in Appendix A.

§9-16.5002-2 Outline of agreement for rental of contractor-owned construction equipment.

Note: This form of agreement is for use where DOE rents construction equipment from a prime cost-type construction contractor, and is designed for use as an appendix to a prime cost-type construction contract.

Attached to and made a part of Contract No.__________________.

Contractor:____.

The following provisions shall govern the use and rental of the Contractor's construction plant and equipment (hereinafter called the "equipment") under the contract:

1. Equipment rented. The Contractor agrees to furnish for his own use in the performance of the contract the equipment itemized in Schedule 1 (attached to and made part of this agreement). Each item of the equipment shall be clearly marked with the identification number assigned to it on Schedule 1. The Contractor and DOE may from time to time amend Schedule 1 by deleting items or adding items.

2. Payments. As provided in the article of the contract entitled "Allowable Costs and Fixed Fee," the allowable costs of the performance of the contract shall include:

(a) Rental. Rental of equipment, for rental periods determined in accordance with paragraph 4 and at the rates set forth in Schedule I applied in accordance with paragraph 3.

(b) Transportation. Transportation of equipment in accordance with paragraph 5.

(c) Repair. Maintenance, repair, and replacement of equipment to the extent provided in paragraphs 6 and 7.

Payment shall be made in accordance with procedures set forth in the article of the contract entitled "Payments."

3. Application of rates. The rates set forth in Schedule 1 shall be applied in accordance with the following rules:

(a) Basis of rates. Rates are based upon one shift of 8 hours per day, 40 hours per week, or 176 hours per month (of 30 consecutive days).

(b) Apportionment of rates. The monthly rate and its prorata share shall apply to all rental periods of 1 month or more. The weekly rate and its pro-rata share shall apply to all rental periods of 1 week or more up to one month. The daily rate and its pro-rata share shall apply to all rental periods up to 1 week.

(c) Overtime. If the equipment is rented by the day, the rate for overtime is one-sixteenth (1/16) of the daily rate for each hour of use in any day in excess of 8 hours; if it is rented by the week, the rate for overtime is one-eightieth (1/80) of the weekly rate for each hour of use in any week in excess of 40 hours; and if it is rented by the month, the overtime rate is one-three hundred and fifty-second (1/352) of the monthly rate for each hour of use in excess of 176 hours in any one 30 consecutive day period.

(d) Insurance. Rental rates include the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods, as indicated in Schedule 1 and copy of policy attached. The Contractor agrees to maintain this insurance coverage for loss of or damage to the equipment during the entire term of this agreement. The Contractor shall waive any right of action against the government to the extent that loss is recovered from insurance applicable to loss, damage or destruction of leased equipment.

NOTE: When rental rates do not include the cost of insurance or self-insurance, substitute the following paragraph:

"Rental rates do not include any factor representing the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods."

4. Rental period. The rental period for which rental is payable for an item of equipment shall consist of a base period, beginning upon the date stipulated in a written notice from the Contracting Officer to the Contractor that DOE has accepted the item of equipment at the job site, and ending upon the date stipulated in a written notice from the Contracting Officer to the Contractor that use of the item of equipment is terminated, subject to the following additions, deductions, and conditions:

(a) In-transit time. There shall be added to the base period:

(1) The actual in-transit time of inbound transportation from one point of shipment to the job site, not exceeding the time required for such transportation by commerical carrier via the most expeditious routing available, of any item of equipment subsequently accepted by DOE and

(2) The actual in-transit time of outbound return transportation from the job site, to the original point of inbound shipment, or other destination at equal or less distance from the job site, not exceeding the time required for such transportation by commercial carrier via the most expeditious routing available, of any item of equipment whose use has been terminated by DOE.

(b) Delay due to repairs.

(1) The time required for repair of equipment shall be deducted from the base period if such repair is necessitated by willful misconduct or lack of good faith on the part of the Contractor's managerial personnel,[1] or made necessary by defects not reasonably ascertainable on initial inspection by DOE.

(2) If an item of equipment has been accepted by DOE, the subsequent withdrawal by the Contractor of such item from the work for necessary repairs (due to causes other than those mentioned in the preceding paragraph) shall not interrupt the running of the base period unless the Contracting

Officer finds that the Contractor has not exercised due diligence in effecting the repairs or in returning the item to use, and in such event the time which the Contracting Officer finds to have been excessive shall be deducted from the base period.

(c) Time for repairs on termination. In the event DOE, in accordance with paragraph 6(c), elects to effect repair or replacement of an item of equipment prior to scheduled return shipment, the time required for such repair or replacement shall be added to the base period.

(d) Trial period. If initial inspection by DOE discloses that the condition of an item of equipment is doubtful, it will not be accepted by DOE without a trial period of operation to prove such item, upon terms and conditions agreed upon by the Contractor and DOE. If the equipment is found unacceptable in the trial period, no rental, transportation, or other expenses will be due the Contractor.

(e) Rental limitation. When the aggregate of rental paid for an item of equipment equals 75 percent of its appraised value, as agreed upon by the Contractor and the Contracting Officer at or prior to the time of acceptance by DOE and set forth in the initial inspection report, the rental period shall cease as to such item for purposes of rental payment. Such item shall thereafter remain available for use under the contract without further rental payments but otherwise in accordance with the terms and conditions of this agreement, until the contractor receives written notice from the Contracting Officer that use of the item is terminated. The limitation of rental to 75 percent of the agreed value shall apply to the total of all rental due under this paragraph 4. A failure to agree as to the value of an item of equipment shall be deemed to be a dispute within the meaning of the article of the contract entitled "Disputes."

5. Transportation. Inbound transportation of equipment, f.o.b. cars from the original point of shipment to the job site, and outbound return transportation of shipment f.o.b. cars to the original point of shipment or to another destination selected by the Contractor at equal or less distance from the job site, shall be at the expense of the Government, subject to the following conditions:

(a) Limitation on return transportation. The Government shall not bear any expense for outbound return transportation in excess of the amount paid for inbound transportation to the job site, except additional amounts representing or equivalent to increase in freight rates applicable to the route to the original point of shipment.

(b) Limitation on long distance transportation. Transportation over a distance in excess of 500 miles shall be subject to the approval of the Contracting Officer.

(c) Transportation by other than common carrier. The expense borne by the Government hereunder for transportation by a method other than common carrier shall be the actual expense of such transportation as shown by evidence satisfactory to the Contracting Officer.

(d) Loading and unloading. Only such costs of loading and unloading equipment as are incurred at the job site shall be borne by the Government.

(e) Equipment not in required condition. The Government shall not bear the expense of transportation of any item of equipment which arives at the job in a condition which does not fulfill the requirements of paragraph 6(a) and which is not placed in the condition required under paragraph 6(a) by the Contractor at the contractor's expense within a reasonable time.

6. Condition of equipment.

(a) Condition on delivery. The equipment shall, on delivery at the job site, be in good operating condition to render efficient, economical, and continuous service, and shall be equipped with necessary and required safety devices according to ICC regulations and other applicable Federal and State laws. Each item of the equipment shall have been registered by the Contractor at the Contractor's own expense with all Federal, State, and local authorities requiring registration, and registration plates or other evidence of registration shall be displayed in accordance with the requirements of the registering authority. The cost of subsequent registration shall also be borne by the Contractor. If any item of equipment on arrival at the job site is not in the condition required by this paragraph, its use on the work shall not be permitted unless and until it is placed in the condition required by this paragraph, at the Contractor's expense and within a reasonable time. If any such item is not placed in the condition required by this paragraph within a reasonable time, the Contracting Officer may reject the item and require its removal from the job site, and in that event, the Government shall not be liable for rental, transportation, or any other expense in connection with such item.

(b) Condition on the job. Equipment accepted by DOE shall be maintained by the Contractor in the condition required for its operation until use of the equipment is terminated by the Contracting Officer. Maintenance and repair required to keep accepted equipment in such condition during such time and replacement (at the agreed value set forth in the initial inspection report, less depreciation) of accepted equipment lost or destroyed during such time, shall be at the expense of the Government unless such maintenance, repair, or replacement is made necessary by loss or damage covered by any policy of insurance (or self-insurance), or caused by willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, or is made necessary by defects not reasonably ascertainable on initial inspection of DOE.

(c) Condition on termination. Upon termination by DOE of the use of any item of equipment, the item shall be returned by DOE to the Contractor at the job site in as good condition as when received by DOE (as shown by the initial inspection report) less normal wear and tear, except for any loss or damage which is due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, or defects not reasonably ascertainable on initial inspection by DOE, or which is covered by any policy of insurance (or self-insurance). If the inspection report to be made immediately prior to the scheduled return shipment of an item of equipment discloses the necessity for repairs or replacement the cost of which is the responsibility of the Government under this paragraph, DOE may at its election either (A) effect such repairs or replacements or (B) allow the Contractor the agreed estimated reasonable cost of such repairs (or the agreed value set forth in the initial inspection report, less depreciation, if replacement is required), and a sum in lieu of rental for the time estimated by the Contracting Officer to be necessary for such repairs. Failure to agree as to the estimated reasonable cost of affecting such repairs or replacement under (C) above, shall be deemed to be a dispute within the meaning of the article of the contract entitled "Disputes."

(d) Inspection. For the purpose of establishing the condition of the equipment, each item of equipment shall be inspected, tested and inventoried by representatives of DOE and at the Contractor's option, together with representatives of the Contractor, prior to its acceptance by DOE and also immediately prior to scheduled return shipment. The results of such inspections and tests, and the inventories compiled, shall be incorporated in reports submitted to the contractor and to the Contracting Officer. For any item of equipment which the Contractor has failed to inspect, test, and inventory, or has failed to report as provided herein, the Contractor agrees that the report submitted hereunder by a representative of DOE shall be conclusive evidence of the condition as of the date of inspection.

(e) Excessive repairs. The Contracting Officer may deduct from payments otherwise due the Contractor, any amounts previously allowed the Contractor under this agreement for repairs made at the Government's expense which the Contracting Officer finds to have been in excess of the requirements of this agreement.

7. Protection of equipment—steps to be taken in event of loss.

(a) The Contractor shall take all reasonable and necessary precautions to safeguard and protect the equipment. Any loss of or damage to the equipment is not reimbursable to the extent that such loss or damage is required to be covered by insurance under paragraph 3(d) of this agreement.

NOTE: When paragraph 3(d) of the agreement provides that rental rates do not include any factor representing the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods, the following paragraph (1) shall be used:

(1) The Contractor shall take all reasonable and necessary precautions to safeguard and protect the equipment. Any loss or damage to the equipment will be at the Contractor's risk to the extent that such loss or damage is covered by any policy of insurance (or self-insurance).

(b) Upon the happening of any loss or damage which is at the risk of the Government under this agreement, the Contractor shall immediately notify the Contracting Officer of the occasion and extent thereof, shall at the Contracting Officer's request effect an assignment and subrogation in favor of the Government of all the Contractor's rights and claims (expect those against the Government) arising out of any such loss or damage, shall, if required by the Contracting Officer, authorize representatives of the Government to settle or prosecute to final judgment any such claims, and shall furnish to the Government on request all reasonable assistance in obtaining recovery.

8. Liquidation of indebtedness. The Contractor warrants full and complete title and right to possession of all the equipment, subject only to those liens, encumbrances or claims to title or possession securing the indebtedness detailed on Schedule 1, Part 2. The contractor agrees to apply such portion of the rental payment hereunder as may be necessary for the prompt discharge of such indebtedness. If at any time any person holding a lien, encumbrance, or claim against any item of equipment shall submit to the DOE evidence that the Contractor is not discharging the indebtedness secured thereby in accordance with the terms under which the indebtedness is payable or dischargeable, DOE shall have the right upon three days' written notice to the Contractor to impound such part of the unpaid rental hereunder, as DOE in its sole discretion deems necessary, until the rights of the Contractor and any such person are determined and all just and proper claims of such persons are satisfied, provided, that nothing contained in this paragraph shall be construed to pay to such person any sum not required to be paid by the terms under which the indebtedness was incurred or to pay any sum prior to the time it becomes due.

9. Taxes. Unless otherwise directed by the Contracting Officer under the article of the contract entitled "State and Local Taxes," the Contractor shall at the Contractor's own expense pay and discharge any and all taxes levied upon any item of the equipment.

---

[1] The term "managerial personnel" as used in this agreement is as defined in the article of the contract entitled "Property."

Schedule 1

Part I – Items and Rental Rates

Item No.	Item description (equipment No.; type of equipment; serial No.; manufacturer; year of model; original point of shipment; etc.)
______________________	______________________
______________________	______________________
Description of any insurance coverage for loss or damage to equipment[1]	Item Rental Rates
______________________	______________________
______________________	______________________

---

[1] Attach certified copy of insurance policy.

(Continue, if necessary, on reverse side or on separate sheets.)

Part 2–Liens, Encumbrances and Claims

The following is a complete and correct statement of the amount or amounts of any and all indebtedness secured by liens or other encumbrances of any nature, legal or equitable, which are held by any person, firm or corporation against the equipment, items Nos. 1 through ______________________.

____
(Contractor)

By______________________________

____
(Title)

Item No.	Name and address of present creditor
______________________	______________________
______________________	______________________
Present unpaid balance	Amounts and date of future payments
______________________	______________________
______________________	______________________

(Continue, if necessary, on the reverse side or on separate sheets.)

§9-16.5002-3 Outline of agreement for rental of third party-owned construction equipment.

Note: This form of agreement is for use where a DOE prime cost-type construction contractor rents construction equipment (without operator) from a third party.

This agreement, made and entered into this ________ day of ________, 19____, by and between ____________________________ (hereinafter called the "lessor") and ____________________________ (hereinafter called the "lessee")

Witnesseth:

Whereas, the lessee has entered into a contract, dated ___________, , (hereinafter called the "construction contract"), with the United States of America (hereinafter called the "Government"), represented by the U.S. Department of Energy hereinafter called "DOE"), for the performance of certain construction work in connection with the construction at ______________________; and

Whereas, the lessor is the owner of certain construction plant and equipment (hereinafter called the "equipment"), listed on the attached Schedule 1 attached to and made a part of this agreement; and

Whereas, the lessee desires to rent the equipment for use in performing the construction contract:

Now, therefore, in consideration of the mutual covenants and conditions herein set forth, it is agreed as follows:

Article I—Equipment rented. The lessor agrees to furnish for use by the lessee in the performance of the construction contract the equipment itemized in Schedule 1 at time specified as follows:

Each item of the equipment shall be clearly marked with the identification number assigned to it on Schedule 1. The lessor and the lessee may from time to time amend Schedule 1 by deleting or adding items.

Article II—Payments. Payments shall be made by the lessee to the lessor at monthly intervals on invoices rendered by the lessor for:

(a) Rental. Rental of equipment, for rental periods determined in accordance with the article entitled "Rental Period" and at the rates set forth in Schedule 1 applied in accordance with the article entitled "Application of Rates."

(b) Transportation. Transportation of equipment in accordance with the article entitled "Transportation."

(c) Repair. Maintenance, repair, and replacement of equipment to the extent provided in the articles entitled "Conditions of Equipment" and "Protection of Equipment—Steps to be Taken in Event of Loss."

Article III—Application of rates. The rates set forth in Schedule 1 shall be applied in accordance with the following rules:

(a) Basis of rates. Rates are based upon one shift of 8 hours per day, 40 hours per week, or 176 hours per month (30 consectutive days).

(b) Apportionment of rates. The monthly rate and its pro-rata share shall apply to all rental periods of 1 month or more. The weekly rate and its pro-rata share shall apply to all rental periods of 1 week or more up to 1 month. The daily rate and its pro-rata share shall apply to all rental periods up to 1 week.

(c) Overtime. If the equipment is rented by the day, the rate for overtime is one-sixteenth (1/16) of the daily rate for each hour of use in any day in excess of 8 hours; if it is rented by the week, the rate for overtime is one-eightieth (1/80) of the weekly rate for each hour of use in any week in excess of 40 hours; and if it is rented by the month, the overtime rate is one-three hundred and fifty-second (1/352) of the monthly rate for each hour of use in excess of 176 hours in any one 30-consecutive-day period.

(d) Insurance. Rental rates include the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods as indicated in Schedule 1 and copy of policy attached. The lessor agrees to maintain this insurance coverage for loss or damage to the equipment during the entire term of this agreement. The lessor shall waive any right of action against the Contractor or the United States Government for loss, damage or destruction of the leased equipment to the extent that the lessor recovers from insurance applicable to loss, damage or destruction of the leased equipment.

NOTE: When rates do not include the cost of insurance or self-insurance, substitute the following paragraph:

"Rental rates do not include any factor representing the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods."

Article IV—Rental period. The rental period for which rental is payable for an item of equipment shall consist of a base period, beginning upon the date stipulated in a written notice from the lessee to the lessor that the lessee has accepted the item of equipment at the job site, and ending upon date stipulated in a written notice from the lessee to the lessor that use of the item of equipment is terminated, subject to the following additions, deductions, and conditions.

(a) In-transit time. There shall be added to the base period:

(1) The actual in-transit time of inbound transportation from the point of shipment to the job site, not exceeding the time required for such transportation by commercial carrier via the most expeditious routing available, of any item of equipment subsequently accepted by the lessee.

(2) The actual in-transit time of outbound return transportation from the job site to the original point of inbound shipment, or other destination at equal or less distance from the job site, not exceeding the time required for such transportation by commercial carrier via the most expeditious routing available, of any item of equipment whose use has been terminated by the lessee.

(b) Trial period. If initial inspection by the lessee discloses that the condition of an item of equipment is doubtful, it will not be accepted by the lessee without a trial period of operation to prove such item upon terms and conditions agreed upon by the lessor and the lessee and approved by DOE. If the equipment is found unacceptable in the trial period, no rental, transportation, or other expenses will be due the lessor.

(c) Delay due to repairs.

(1) The time required for repair of equipment shall be deducted from the base period if such repair is necessitated by willful misconduct or lack of good faith on the part of the lessor, of an individual, or the partners or corporate officers of the lessor, or a supervising representative of the lessor, or made necessary by defects not reasonable ascertainable on initial inspection by the lessee.

(2) If arrangements are made for the lessor to repair an item of equipment, the withdrawal of such item from work for necessary repairs (due to causes other than those mentioned in the preceding paragraph) subsequent to acceptance of the item by the lessee shall not interrupt the running of the base period, unless the lessee or DOE finds that due diligence in effecting the repairs or in returning the item to use has not been exercised. In the latter event, the time found to have been excessive shall be deducted from the base period.

(d) Time for repairs on termination. In the event the lessee, in accordance with the article entitled "Condition of Equipment," elects to effect repair or replacement of an item of equipment prior to scheduled return shipment of the item, the time required for such repair or replacement shall be added to the base period.

Article V—Transportation. Inbound transportation of equipment, f.o.b. cars from the original point of shipment to the job site, and outbound return transportation of equipment f.o.b. cars to the original point of shipment or to another destination selected by the lessor at equal or less distance from the job site, shall be at the expense of the lessee, subject to the following conditions:

(a) Limitation on return transportation. The lessee shall not bear any expense for outbound return transportation in excess of the amount paid for inbound transportation to the job site, except additional amounts approved by DOE representing or equivalent to increase in freight rates applicable to the route to the original point of shipment.

(b) Limitation on long distance transportation. Transportation over a distance in excess of 500 miles shall be subject to the approval of the lessee and DOE.

(c) Transportation by other than common carrier. The expense borne by the lessee hereunder for transportation by a method other than common carrier shall be the actual expense of such transportation as shown by evidence satisfactory to the lessee and DOE, but shall in no case exceed the amount which would be paid for such transportation by a suitable and available common carrier, unless otherwise authorized by the lessee and DOE.

(d) Loading and unloading. Only such costs of loading and unloading equipment as are incurred at the job site shall be borne by the lessee.

(e) Equipment not in required condition. The lessee shall not bear the expense of transportation of any item of equipment which arrives at the job site in a condition which does not fulfill the requirements of the article entitled "Condition of equipment" and which is not placed in the condition required under that article by the lessor at the lessor's expense within a reasonable time.

Article VI—Condition of equipment.

(a) Condition on delivery. The equipment shall, on delivery at the job site, be in good operating condition to render efficient, economical, and continuous service and shall be equipped with necessary and required safety devices according to ICC regulations and other applicable Federal and State laws. Each item of the equipment shall have been registered by the lessor at the lessor's own expense with all Federal, State, and local authorities requiring registration, and registration plates or other evidence of registration shall be displayed in accordance with the requirements of the registering authority. The cost of subsequent registration shall also be borne by the lessor. If any item of equipment on arrival at the job site is not in the condition required by this paragraph, its use on the work shall not be permitted unless and until it is placed in the condition required by this paragraph at the lessor's expense and within a reasonable time. If any such item is not placed in the condition required by this paragraph within a reasonable time, the lessee may reject the item and require its removal from the job site, and in that event, the lessee shall not be liable for rental, transportation, or any other expense in connection with such item.

(b) Condition on the job. Maintenance and repair necessary to keep accepted equipment in the condition required for its operation until use of the equipment is terminated by the lessee, and replacement (at the value agreed upon by the lessor and the lessee with the approval of DOE at or prior to the time of acceptance by the lessee and set forth in the initial inspection report, less depreciation) of accepted equipment, lost or destroyed during such time, shall be at the expense of the lessee. Except, however, such maintenance, repair, or replacement will not be at the expense of the lessee if it is made necessary by loss or damage covered by any policy of insurance (or self-insurance), or caused by wilful misconduct or lack of good faith on the part of the lessor, of an individual, or the partners or corporate officers of the lessor, of a supervising representative of the lessor, or is made neccessary by defects not reasonably ascertainable on initial inspection by the lessee.

(c) Condition on termination. Upon termination by the lessee of the use of any item of equipment, the item shall be returned by the lessee to the lessor at the job site in as good condition as when received by the lessee (as shown by the initial inspection report), less normal wear and tear, except for any loss or damage which is due to wilful misconduct or lack of good faith on the part of the lessor, of an individual, or the partners or corporate officers of the lessor or a supervising representative of the lessor, or defects not reasonably ascertainable on initial inspection by the lessee, or which is covered by any policy of insurance (or self-insurance). If the inspection report to be made immediately prior to the scheduled return shipment of an item of equipment discloses the necessity for repairs or replacements, the cost of which is the responsibility of the lessee under this paragraph, the lessee may, at its election, either (1) effect such repairs or replacements, or (2) with the approval of DOE, allow the lessor the agreed estimated reasonable cost of such repairs (or the agreed value less depreciation, if replacement is required), and a sum in lieu of rental for the time estimated by the lessee to be necessary for such repairs.

(d) Inspection. For the purpose of establishing the condition of the equipment, each item of equipment shall be inspected, tested, and inventoried by representatives of the lessee and, at the lessor's option, together with representatives of the lessor (and of DOE, if DOE so elects), prior to its acceptance by the lessee and immediately prior to scheduled return shipment. The results of such inspections and tests, and the inventories compiled, shall be incorporated in reports submitted to the lessor and to the lessee (and to DOE if DOE so requires). For any item of equipment which the lessor has failed to inspect, test, and inventory, or has failed to report as provided herein, the lessor agrees that the report submitted hereunder by a representative of the lessee shall be conclusive evidence of the condition as of the date of inspection.

(e) Excessive repairs. DOE may require the lessee to deduct from payments otherwise due the lessor any amounts previously allowed the lessor under this agreement for repairs made at the lessee's expense which DOE finds to have been in excess of the requirements of this agreement.

Article VII—Protection of equipment—Steps to be taken in event of loss.

(a) The lessee shall take all reasonable and necessary precautions to safeguard and protect the equipment. Any loss of or damage to the equipment will be at the lessor's risk to the extent that such loss or damage is required to be covered by insurance under Article III(d) of this agreement.

NOTE: When Article III(d) of the agreement provides that rental rates do not include any factor representing the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods, the following paragraph (a) shall be used:

"(a) The lessee shall take all reasonable and necessary precautions to safeguard and protect the equipment. Any loss of or damage to the equipment will be at the lessor's risk to the extent that such loss or damage is covered by any policy of insurance (or self-insurance)."

(b) Upon the happening of any loss or damage which is at the risk of the lessee under this agreement, the lessee shall immediately notify the lessor of the occasion and extent thereof, and the lessor shall thereupon, at the lessee's request, effect an assignment and subrogation in favor of the lessee or the Government of all the lessor's rights and claims (except those against the lessee or the Government) arising out of any such loss or damage, shall, if required by the lessee or the Government, authorize representatives of the lessee or the Government to settle or prosecute to final judgment any such claims, and shall furnish to the lessee or the Government on request all reasonable assistance in obtaining recovery.

Article VIII—Liquidation of indebtedness. The lessor warrants full and complete title and right to possession of all the equipment, subject only to those liens, encumbrances or claims to title or possession securing the indebtedness detailed on Schedule 1, Part 2. The lessor agrees to apply such portion of the rental payable hereunder as may be necessary for the prompt discharge of such indebtedness. If at any time, any person holding a lien, encumbrance, or claim against any item of the equipment shall submit to the lessee evidence that the lessor is not discharging the indebtedness secured thereby in acordance with the terms under which the indebtedness is payable or dischargeable, the lessee shall have the right upon three days' written notice to the lessor to impound such part of the unpaid rental hereunder as the lessee, with the approval of DOE, deems necessary until the rights of the lessor and any such person are determined and all just and proper claims of such person are satisfied, provided that nothing contained in this paragraph shall be construed to require the lessor to pay to such person any sum not required to be paid by the terms under which the indebtedness was incurred or to pay any sum prior to the time it becomes due.

Article IX—Taxes. Unless otherwise directed by DOE, the lessor shall at the lessor's own expense pay and discharge any and all taxes levied upon any item of equipment.

Article X—Examination of records. Insert article in accordance with §9-7.103-3.

Article XI — Covenant against contingent fees. Insert article in accordance with FPR 1-1.503.

Article XII — Renegotiation. Insert contract article set forth in §9-7.102-51 if the agreement is subject to the Renegotiation Act of 1951, as amended.

Article XIII — Definition. As used herein the term "DOE" means the U.S. Department of Energy or any duly authorized representative thereof, including the Contracting Officer under the construction contract.

Article XIV — Equal Opportunity. Insert contract article in accordance with FPR 1-12.803-2.

In witness whereof, the lessor and the lessee have executed this agreement as of the day and year above written.

____
(Lessor)

By ______________________________

____
(Title)

____
(Lessee)

By ______________ ______________

____
(Title)

Schedule 1

Part 1 – Items and Rental Rates

Item No.	Item description (equipment No.; type of equipment; serial No.; manufacturer; year of model; original point of shipment; etc.)
______________________	______________________
______________________	______________________
Description of any insurance coverage for loss or damage to equipment[1]	Item Rental Rates
______________________	______________________
______________________	______________________

---

[1] Attach certified copy of insurance policy.

(Continue, if necessary, on reverse side or on separate sheets.)

Part 2–Liens, Encumbrances and Claims

The following is a complete and correct statement of the amount or amounts of any and all indebtedness secured by liens or other encumbrances of any nature, legal or equitable, which are held by any person, firm or corporation against the equipment, items Nos. 1 through ______________.

____
(Lessor)

By______________________

____
(Title)

Item No.	Name and address of present creditor
______________________	______________________
______________________	______________________
Present unpaid balance	Amounts and date of future payments
______________________	______________________
______________________	______________________

(Continue, if necessary, on the reverse side or on separate sheets.)

§9-16.5002-4 Outline of inspection report of equipment.

(a) Inspection report for cranes, draglines, etc.

Project ....

Date ....

Location ....

Code No. .... License No. ....

Description ....

....

(ATTACHMENTS LISTED ON REVERSE SIDE)

Date and time of arrival ....

Via ....

Owner's name and address ....

....

Motor No. ....

Serial .... Year Manufactured ....

Other pertinent Nos. ....

Size .... Type ....

No. of cylinders .... Horsepower ....

Type power .... Lifting capacity ....

Manufacturer ....

Address ....

Shipping weight ....

Cost new ....

Present valuation est.[1] ....

Estimated cost to place in good operating condition[2] ....

Crawler treads ....

Boom hoist shaft and bearings ....

Adjustments remaining ....

Main drive chain or gear ....

Crawler tread pins ....

Main driving pinion ....

Crawler frame ....

Main clutch ....

Drive sprockets ....

General condition of motor ....

Hoist drum gear ....

Cab lock holds ....

Boom hoist break facing ....

Boom hoist brake holds ....

Boom hoist brake lining ....

Shows signs of oil consumption ....

Boom hoist clutch ....

Hoist brake holds ....

Remarks ....

....

....

---

[1] Attach an explanation of the valuation estimate.

[2] Attach an explanation of the major and minor repairs needed.

At time of inspection, equipment was in good operating condition. In our opinion, the valuation of $ ____________ ________ placed upon this equipment is ____________________ fair and reasonable. We mutually agree upon a valuation of $ ____________________.

(Signed)____
(Inspector)

(Signed)____
(Inspector)

(b)Give complete description of all attachments, spare parts, etc.

CLAMSHELL BUCKET

Make .... Model ....

Serial .... Size .... Type ....

Number of teeth .... Number of sheaves ....

Condition of sheaves ....

Condition of sheave shafts upper ....

Condition of sheaves lower ....

Condition of sheave shafts lower ....

Condition of center shaft ....

Condition of center shaft castings ....

Condition of arm pins ....

Condition of teeth ....

Condition of bucket general ....

....

....

....

....

DRAG BUCKET

Condition of teeth ....

Condition of chain ....

Condition of sheave ....

General condition ....

Fair lead ....

Fair lead sheaves ....

SHOVEL ATTACHMENTS

Condition boom ....

Dipper stick ....

Crowd gears ....

Sheaves ....

Bucket ....

Bucket latch ....

Number teeth ....

Condition teeth ....

Pins and bushings ....

BACK HOE

Condition boom .... Length ....

Dipper stick ....

Crowd gears ....

Sheaves ....

Buckets ....

Bucket latch ....

Number teeth ....

Conditions of teeth ....

Pins and bushings ....

Miscellaneous attachments, such as—Hydraulic Control System, Air System, Light Plants, Starting Motor. Give full description, numbers, condition tools, etc.

....

....

....

Unit transferred to .... Date ....

....

....

....

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PART 9-17 EXTRAORDINARY CONTRACTUAL ACTIONS TO FACILITATE THE NATIONAL DEFENSE

Subpart 9-17.1 General

§9-17.101 Authority.

(a) Pursuant to Public Law 85-804, and Executive Order No. 10789, as amended, the DOE, for functions transferred from ERDA, Department of the Interior, Department of Commerce and the Navy, has been authorized to exercise the authority provided for in the Act. This authority, which expands ordinary contracting authority, enables it to achieve procurement objectives and pursue policy goals which otherwise might be unattained. The authority of the Act, the Executive Order, and these regulations establish no rights in any party outside the agency and the exercise of authority is wholly discretionary with the agency.

(b) The authority vested in the Secretary by the Act and the Executive order, as amended, is delegated to:

(1) The Senior Procurement Official, Headquarters, provided that such delegation does not include authority to deny relief in contractual fairness cases as defined in §9-17.204-52, and by the Senior Procurement Official, Headquarters, to Heads of Procuring Activities with respect to contractual fairness cases only (not to exceed $50,000), provided that such delegation does not include authority to deny relief.

(2) The Board of Contract Appeals (which for the purpose of this part is designated as a Contract Adjustment Board) with respect to contractual fairness cases as defined in §9-17.204-52, and such other matters as may be referred to the Board by the Senior Procurement Official, Headquarters, or designee. This authority only extends to cases arising out of functions transferred from ERDA.

(c) The delegations of authority in paragraph (b) of this section are subject to the limitations in FPR 1-17.205-1 and, in the case of contractual fairness cases under $50,000, also of FPR 1-17.205-2. The delegation of authority to the Heads of Procuring Activities may not be redelegated.

§9-17.102 General policy.

(a) The authority may be used only when there exists the following two conditions pertaining directly to the interests of national defense:

(1) The Department is exercising a function in connection with the national defense; and

(2) The Department finds that the use of the authority will facilitate the national defense.

(b) The basis for satisfying the condition in paragraph (a) (2)of this section is a determination that the use of the authority under the Act will:

(1) Effect the accomplishment or implementation of an important procurement objective or policy goal of the Department; or

(2) Provide fair and equitable treatment by the Department to persons directly or indirectly involved in procurement or other contract activities by the Department.

(c) If a determination is made pursuant to §9-17.102(b), the required statutory finding that the use of the authority will facilitate the national defense is conclusively established without need for further consideration.

§9-17.103 Types of action.

The two types of actions under FPR 1-17.103 are classified as follows for Department purposes:

(a) Cases of special management consideration; and

(b) Cases of contractual fairness.

§9-17.105 Reports.

The Senior Procurement Official, Headquarters or designee is responsible for preparing the annual report to the Congress required by FPR 1-17.105.

Subpart 9-17.2 Requests for Contractual Adjustment

§9-17.204 Standards for deciding cases.

§9-17.204-50 General.

(a) The types of situations identified in FPR 1-17.204 are divided into cases requiring special management consideration and cases giving rise to questions of contractual fairness.

(b) The authority under the Act may be exercised to accomplish or implement important procurement objectives or policy goals of the Department of Energy when ordinary means are deemed to be lacking or inadequate. In cases of special management consideration, the authority is a management tool available for use as the need requires.

(c) The procurement mission of Department of Energy requires a firm policy of fair and equitable treatment by the Department of contractors, subcontractors, vendors, suppliers, consultants, and all others who directly or indirectly perform services for or furnish material or capacity to the Department. In contractual fairness cases, exercise of the authority under the Act is proper when the normal administrative means for the Department to assure fair and equitable treatment to those involved in its procurement or other contract activities are inadequate.

(d) All requests for use of authority under the Act shall be decided as expeditiously as possible and in accordance with applicable policy and procedural standards in this part.

§9-17.204-51 Cases of special management consideration.

(a) These are cases concerned with facilitating the national defense through the accomplishment of an important procurement objective or policy goal of the Department. Such cases include the amendment of contracts under FPR 1-17.204-2(a), advance payments, and the exercise of residual powers under FPR 1-17.3. In addition to amendments without consideration in essentiality cases, examples of cases for special management consideration are:

(1) Transfer of Department property,

(2) Special terms and conditions such as indemnification or wage stabilization agreements in contracts, and

(3) Resolution of problems arising out of relationships between a prime contractor and its subcontractors, vendors, suppliers, and consultants.

(b) The exercise of the authority in cases of special management consideration may immediately concern anyone directly or indirectly involved in procurement or other contract activities of the Department, including prime contractors, subcontractors, vendors, suppliers, and consultants.

§9-17.204-52 Cases of contractual fairness.

These are cases concerned with facilitating the national defense through fair and equitable treatment by the Department of its prime contractors, and of its subcontractors, vendors, suppliers, consultants, and other persons directly or indirectly involved in procurement or other contract activities of the Department. Such cases include:

(a) Correction or mitigation of the effects of a mistake in a prime contract of the Department (FPR 1-17.204-3);

(b) Formalizing informal commitments (FPR 1-17.204-4); and

(c) Adjustments in contracts based on Department action (FPR 1-17.204-2(b)).

§9-17.207 Requests by contractors.

§9-17.207-1 Filing requests.

A request for use of the authority may be made by any party who performs services for or furnishes material or facilities to the Department, either directly or indirectly. The request shall be filed in quintuplicate with the cognizant Head of the Procuring Activity or designee. If such filing is impractical, requests will be deemed to be properly filed if filed with the Senior Procurement Official, Headquarters, or designee.

§9-17.207-2 Form of requests.

In addition to the requirements of FPR 1-17.207-2, if the request is by a subcontractor, vendor, supplier, or consultant under a DOE prime contract, a copy of the request by the requesting party to the prime contractor for a statement of his position with respect to the proposed use of authority under the Act and a copy of his reply, if available, shall also be filed with the Head of the Procuring Activity or designee. All possibilities for dispostion of any claim between the prime contractor and the party requesting relief should be exhausted prior to requesting the use of the authority under the Act. In instances where the possibilities for disposition have not been exhausted, the matter will be referred to the prime contractor for consideration.

§9-17.207-50 Procedure for handling cases.

(a) Special management consideration cases:

(1) All requests for the exercise of authority under the Act in cases of special management consideration shall be referred to the Senior Procurement Official, Headquarters, or designee for consideration, provided that requests under $50,000 may be referred by the Senior Procurement Official, Headquarters, or designee to the cognizant Head of the Procuring Activity for disposition.

(b) Cases of contractual fairness:

(1) Requests for use of the authority under the Act in cases of contractual fairness (not to exceed $50,000) shall be referred to the Head of the Procuring Activity having cognizance over the contract or subcontract involved, or in the case of Headquarters' contracts, the Senior Procurement Official, Headquarters, or designee.

(2) Thereupon, steps shall be taken to ascertain promptly whether or not the request contains the information called for under §9-17.207-2 and if it does not, additional information needed to cure the deficiency shall be requested from the person requesting relief.

(3) Where a request cannot be resolved by the Head of a Procuring Activity solely because the request for relief is in excess of $50,000, he shall forward the request to the Senior Procurement Official, Headquarters, or designee with his recommendation.

(4) In the event the resolution proposed by the Head of the Procuring Activity or designee is unacceptable to the person making the request, it shall be referred to the Board of Contract Appeals (acting in its capacity as a Contract Adjustment Board) for disposition in accordance with this part.

(c) The Senior Procurement Official, Headquarters, or designee or Head of the Procuring Activity may, in their discretion, refer requests at any time to the Board of Contract Appeals (acting in its capacity as a Contract Adjustment Board).

§9-17.208 Processing cases.

(a) When submitting cases for consideration by the Senior Procurement Official, Headquarters, or designee, Heads of Procuring Activities shall submit four copies of the following along with the cases:

(1) The contractor's request in the form described in FPR 1-17.207-2,

(2) The preliminary record required by FPR 1-17.207-3,

(3) The facts and evidence described in FPR 1-17.207-4, unless the Senior Procurement Official, Headquarters, shall approve their omission, and

(4) The recommended course of action.

(b) Cases within the jurisdiction of the Board of Contract Appeals (acting in its capacity as a Contract Adjustment Board) shall be submitted directly to the Board, and the submission shall include the data described in paragraph (a) of this section.

§9-17.208-3 Disposition.

Subject to FPR 1-17.208-3(b) and applicable security regulations, in cases of special management consideration where the authority is used and in all cases of contractual fairness, Memoranda of Decision shall be available for public inspection.

§9-17.208-4 Records.

Heads of Procuring Activities, the Senior Procurement Official, Headquarters, or designee and the Chairman of the Board of Contract Appeals (acting in its capacity as a Contract Adjustment Board) shall maintain the records required by FPR 1-17.208-4 for each case handled within their respective areas of authority.

§9-17.208-50 Proceedings before the Contract Adjustment Board (CAB).

(a) When a case is to be decided by the Contract Adjustment Board, the CAB shall proceed in the same general manner as when it presides as the Board of Contract Appeals with respect to cases before it. Any party directly affected by a request for the exercise of authority under the Act shall be entitled to a hearing by the CAB of the same general character as the Board of Contract Appeals otherwise provides. The CAB shall make its decision on the record, prepare a Memorandum of Decision as provided in FPR 1-17.208-3, and thereupon transmit it to all parties to the proceeding.

(b) Whenever a case is before the Board of Contract Appeals and it appears that the case is one of contractual fairness under §9-17.204-52, the Board may continue to hear and decide the case as a Contract Adjustment Board with or without sending it to the Head of the cognizant Procuring Activity for consideration, depending on the particular circumstances and the requirement of fair and equitable treatment of all parties concerned, provided that whenever a case is based on a request for use of the authority under the Act, it shall be placed on the CAB's docket for such cases.

§9-17.208-51 Intra-agency coordination.

When a request for use of authority under the Act involves issues relating to both special management consideration and contractual fairness, the handling of the request shall be coordinated by the Senior Procurement Official, Headquarters, or designee and the Chairman, Contract Adjustment Board, provided that the Senior Procurement Official, Headquarters, or designee shall have the option of acting first on the request. After the Senior Procurement Official, Headquarters, or designee acts upon the request, the request may still be regarded as a case of contractual fairness and handled accordingly.

Subpart 9-17.3 Residual Powers

§9-17.304 Records.

The Senior Procurement Official, Headquarters, or designee shall retain a copy of the memorandum required by FPR 1-17.303(a).

Subpart 9-17.4 Records of Requests and Dispositions

§9-17.402 Final records.

Heads of Procuring Activities, the Senior Procurement Official, Headquarters, or designee and the Chairman, Board of Contract Appeals (acting in its capacity as a Contract Adjustment Board) shall prepare the final record described in FPR 1-17.402 for each case handled within their respective areas of authority.

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PART 9-18 PROCUREMENT OF CONSTRUCTION

§9-18.000 Scope of part.

This part implements and supplements the contracting procedures peculiar to construction contracts set forth in FPR Part 1-18 and also sets forth related DOE requirements for architect-engineer service contracts.

Subpart 9-18.1 General Provisions

§9-18.112 Construction contracts with design architect-engineers.

See §9-1.5412.

Subpart 9-18.2 Formal Advertising

§9-18.203-1 Preparation of invitations for bids.

The following procedure shall be followed in furnishing copies of constructions plans and specifications:

(a) On all invitations, plans and specifications will be available on request to all prospective bidders, including general contractors, subcontractors, and material and equipment suppliers. Where the cost of reproduction is $10 or more, the charge shall be a minimum of $10 and subject to a maximum of $100, depending upon the size of the project and the number of drawings and the volume of specifications involved. Where the cost of reproduction is less than $10, the Head of the Procuring Activity has authority to make distribution at cost of reproduction, or free of charge, as a particular situation dictates.

(b) No refund for the return of plans and specifications will be made except when the invitation is canceled or no award is made under the invitation. Under such circumstances, refund or payments will be made upon return of the plans and specifications in good condition to the issuing office.

(c) Plans and specifications will be issued without charge to such organizations as The Associated General Contractors of America, American Road Builders' Association, Dodge Reports, Blue Reports, Brown's Letters, Inc., builders and contractors exchanges in the locality in which the project is to be constructed, and others that maintain public plan display rooms.

(d) Payments received for plans and specifications shall be handled in accordance with the regulations prescribed by the General Accounting Office in sections 3020-10 and 3030 of Title 7 of GAO Manual for Guidance of Federal Agencies.

(e) If the Contracting Officer desires to have the architect-engineer or construction manager handle the furnishing of plans and specifications and payments therefor, the invitation for bids should so state, and the architect-engineer or construction management contract should provide the manner in which the receipts are to be handled, generally as a credit to the contract.

(f) No charge will be made to original receivers of plans and specifications for revised sheets of drawings and revised pages to specifications which are issued by amendments to invitations.

(g) Plans and specifications may be furnished to other applicants not having a legitimate interest therein in a manner determined by a Head of a Procuring Activity.

(h) Plans and specifications may be issued in complete sets only, or in complete sets and parts of sets, as the Head of the Procuring Activity determines to be best. If less than complete sets of plans and specifications are issued, the distribution should be based on an applicant's request for specific pages and drawing sheets.

(i) Contracting offices should control the number of copies of plans and specifications to be made available to any firm, consistent with the type of firm, the amount of charge, and requirements of the project.

(j) When a non-refundable fee is to be charged, a statement substantially as follows is to be included in the solicitation.

NONREFUNDABLE FEE FOR PLANS AND SPECIFICATIONS

A fee of $_______ is required for the plans and specifications referenced in this solicitation. Send check or money order to ___________________________________. The fee is not refundable. Plans and specifications need not be returned.

§9-18.205 Prebid conferences.

See §9-1.353.

Subpart 9-18.3 Negotiations

§9-18.303 Price negotiation policies and procedures.

See Subpart 9-1.50, §9-3.405-5, and §9-3.800.

§9-18.306-2 Cost-reimbursement type letter contracts.

(c) Conclusion of negotiations. Architect-engineer letter contracts should also include the basis for determining the fee, which establishes the possible range of fees for the work.

§9-18.306-3 Selection of a cost-reimbursement type contractor.

See Part §9-3.805.

§9-18.306-50 Preparation for negotiation architect-engineer and cost-plus-a-fixed-fee construction contracts.

(a) General. Prior to the initiation of negotiations, the Head of the Procuring Activity or designee shall develop an independent Government estimate which shall include the following information:

(1) Description of the work. A sufficiently detailed description and cost estimate of the work should be provided to permit an evaluation of services to be performed by the various participants and the degree of complexity of its principal components. When A-E contracts are fixed price, the information as to the work should be in more detail and on a firmer basis, particularly as to estimated costs, than for a CPFF contract. The estimated cost of the component items (including the costs of material and equipment furnished by DOE) and their descriptions, insofar as available, should be included as follows:

(i) Major buildings and other structures for which complete designs and specifications are to be prepared by the architect-engineer, including number and cost of each type, with as much information as is available (within security requirements) as to the functional requirements for such structures;

(ii) Major utilities, including classifications and costs, in as much detail as practicable;

(iii) Special equipment to be procured by the operating contractor, construction contractor, or architect-engineer, or furnished by DOE;

(iv) Special equipment to be designated by the architect-engineer; and

(v) Special equipment to be installed by the construction contractor.

(2) Estimated cost and time for completion. A statement should be provided indicating total estimated cost of the work exclusive of the construction contractor's fee, and to the extent available, identifying labor, material, and indirect costs, and any amount included for contingencies; estimated cost of architect-engineer services; and the estimated time of completion of design or construction work with an explanation of the basis for establishing the completion schedules.

(b) Extent of services —

(1) Architect-engineer contracts. A written statement should be prepared which gives the extent to which the services of the architect-engineer include any of the services set forth below.

(i) Title I—Provide the necessary topographical and other field surveys, test borings, and other subsurface investigations; prepare preliminary studies, sketches, layout plans, and outline specifications; and prepare reports including estimates of cost of the proposed project and of all structures, utilities, and appurtenances thereto.

(ii) Title II—Provide complete design of the work including preparation of all required preliminary and final working drawings, specifications, estimates, and contract documents; and assist in securing, analyzing, and evaluating bids or proposals for construction; and consult with DOE on all questions arising in connection with the services performed by the architect-engineer.

(iii) Title III—Provide complete architect-engineer supervision and inspection of construction under the direction of a responsible representative, check shop drawings, and furnish record drawings to show construction has actually been accomplished.

(iv) Process design. Process design normally requires the preparation of flow diagrams showing each operating step to perform the process; material and heat balances where required; determination of the nature, capacity and design characteristics of production equipment; the general design of connecting flow lines to handle the calculated rates of product and by-product flow; and schematic layouts.

(v) Procurement of materials and equipment (describe fully) if specified for accomplishment in conjunction with Title I, II, and III services and approved by the Senior Procurement Official.

(vi) Other special services (describe fully) if specified for accomplishment in conjunction with Title I, II, and III services and approved by the Senior Procurement Official.

(2) Cost-plus-a-fixed-fee construction contracts. See FPR 1-18.306-2.

(3) Cost-plus-a-fixed-fee engineer-construction contracts. A written statement should be prepared which sets forth the extent to which the services of the contractor cover the services set forth in subparagraphs (1) and (2) of this paragraph.

(4) Procurement of special equipment. Contracts for procurement services only are rarely used. Procurement of special equipment is generally contracted for in conjunction with CPFF contracts for construction, operating, or architect-engineer services. In special situations, procurement of other equipment and construction materials is also contracted for in conjunction with CPFF contracts for operating or architect-engineer services. The description of procurement services in subdivision (ii) of this subparagraph is applicable to all of these cases.

(i) Special equipment is equipment for which the purchase price is of such a magnitude compared to the cost of installation as to improperly reflect the amount of technical direction and management effort required of the contractor. The determination of specific items of equipment in this category requires application of judgment and careful study of the circumstances involved for each project. This category of equipment would generally include items such as:

(A) Major items of prefabricated process or research equipment.

(B) Major items of preassembled equipment such as packaged boilers, generators, machine tools, and large electrical equipment. In some cases it would also include special apparatus or devices such as reactor vessels and reactor charging machines.

(ii) Description of procurement services: Procurement as herein considered is an activity involving judgment, knowledge, and experience relating to the manufacture, use, or application of the article or process to be purchased. It may include the development or location of sources of supply, and generally includes preparation of bidding documents, solicitation of proposals, analysis of proposals received (including, where necessary, technical and sometimes complicated evaluation of performance characteristics of the equipment of different manufacturers), inspection at manufacturer's plant as distinguished from inspection supplied under title III services of an architect-engineer contract, and evaluation of production capacities to meet required delivery. Procurement includes necessary coordination with participating contractors and DOE for especially designed equipment, general and specific expediting, and special assistance to the manufacturers in helping to locate scarce materials and machine tools and in supporting allocation for critical materials where this is a necessary function. Procurement normally includes inspection and receiving upon delivery at the site (this may be a joint activity where the procuring agent is not the constructor) and payment. All on-site physical activities after delivery, including unloading, warehousing, hauling, and installation, are considered a

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construction activity and not procurement.

(iii) Selection of procuring agent. Coordination, timing, and technical know-how are important factors to be considered in the selection of a procuring agent. The advantages and disadvantages of placing full responsibility in one contracor for construction and procurement, or split responsibility where the procurement is placed under a contract with the architect-engineer or operating contractor, should be evaluated in the light of the above factors.

§9-18.307 Negotiations.

See §9-3.805.

Subpart 9-18.6 Buy American Act

§9-18.600 Scope of Subpart.

This subpart implements FPR Subpart 1-18.6.

§9-18.602-1 General.

(a) The Secretary may make the determination required by FPR 1-18.602-1(a) and may authorize deviations described in FPR 1-18.603-3.

(b) Contracting officers may make the determinations required by FPR 1-18.602-1(b) and (c).

§9-18.606 Violations of Buy American Act provisions in construction contracts.

Contracting Officers shall make a complete written report (in triplicate) to the Secretary through the Senior Procurement Official, Headquarters, of each violation of the Buy American Act provisions in contracts for construction. See FPR 1-18.606 and subpart 9-1.6.

§9-18.650 Excepted supplies to be used in the construction, alteration, or repair of any public work.

The list of excepted supplies appearing at §9-6.105 shall be noted in the specifications.

Subpart 9-18.7 Labor Standards for Contracts Involving Construction

§9-18.700 Scope of subpart.

This subpart serves to implement and supplement FPR subpart 1-18.7.

§9-18.701 Applicability.

§9-18.701-50 General.

The requirements set forth in FPR 1-18.702 apply to construction contracts. Although the statutes therein referenced do not contain definitions, the Secretary of Labor's regulations in 29 CFR 5.2 include definitions, of "contract," "building," "work," "construction," "prosecution," "completion," "repair," "public building," and "public work." In general, contracts are classifiable as being covered by the statutes when performance by the contractor consists substantially of the erection or assembly of new plants (including laboratory or other buildings or works), or the alteration and/or repair including painting and decorating, of new or existing plants. The fact that certain contracts may be entered into without regard to general statutory requirements as to advertising for bids or proposals, or upon a cost-type basis or otherwise, is not determinative in the classification of such contracts, activities, construction projects, or other work or services performed thereunder.

§9-18.701-51 Noncoverage (Davis-Bacon and Copeland Acts.)

(a) The requirements set forth in FPR subpart 1-18.7 in respect to the Davis-Bacon and Copeland Acts do not apply to the following:

(1) Contracts, regardless of their nature, not in excess of $2,000 (Does not apply to the Copeland Act.) However, no item of work, the cost of which is estimated to be in excess of $2,000, shall be artificially divided into portions less than $2,000 for the purpose of avoiding the applicability of the Davis-Bacon Act.

(2) Contracts for furnishing supplies and equipment, including installation, where the installation requires only an incidental amount of work (as defined in paragraph (c) of this section) that would otherwise be considered construction alteration and/or repair of a public building or work (see §9-18.750-2(g)).

(3) Contracts for servicing or maintenance work in an existing plant, including installation or movement of machinery or other equipment, and plant rearrangement, which involve only an incidental amount of work (as defined in paragraph (c) of this section) that would otherwise be considered construction, alteration and/or repair (see §9-18.750-2(g)).

(4) Contracts for operational or maintenance activities (e.g. production, research and development, or community services, as distinguished from contracts for construction). In general, these are contracts where performance by the contractor consists primarily of the utilization of existing facilities and the services of personnel to produce materials, conduct research and development, or provide community-type services, and of the use of or maintenance of plant. However, the classification of a contract as a contract for operational or maintenance activities does not necessarily mean that all work and activities at the contract location are not covered, since it may be necessary to separate out work which should be classified as covered. (See §9-18.701-52). As used in connection with "operational activities," the term "produce" means to manufacture, make, or refine special nuclear or other material; to separate material from other substances in which it is contained; or to make new material. The term "materials" includes supplies, articles, or equipment; the term "research and development" means the same as defined in §9-1.5405(b).

(5) Contracts to be performed outside the United States and the District of Columbia. (Does not apply to the Copeland Act.)

(6) Contracts for demolition, except when performed as a phase of a covered construction project or when subsequent construction activity at the site being cleared is contemplated.

(7) Contracts with a State or subdivision thereof. (See FPR 1-18.703-2).

(8) Contracts with railroads for construction services to the extent that the services are performed by railroad employees covered by the Railway Labor Act.

(b) It should be noted, however, that the requirements do apply to work performed by laborers and mechanics employed by a construction contractor or subcontractor at the site of the work under a contract for the construction, alteration and/or repair, including painting and decorating of public buildings or public works, which is otherwise subject to these Acts whether or not such work would be covered if it were a separate contract.

(c) As used in paragraph (a)(2) and (3) of this section, "an incidental amount of work" is defined to mean work directly related to the installation, movement or rearrangement of equipment or machinery, relatively small in amount, and which does not include changes in a facility affecting its architectural or structural strength, stability, safety, size, or function as a public work.

§9-18.701-52 Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities.

(a) Particular contracts or work items falling within one or more of the following criteria normally will be classified as noncovered.

(1) Individual work items estimated to cost $2,000 or less. The total dollar amount of the operating contract is not a factor to be considered and bears no relation to individual work items classified as construction, alteration and/or repair, including painting and decorating. However, no item of work, the cost of which is estimated to be in excess of $2,000, shall be artificially divided into portions less than $2,000 for the purpose of avoiding the application of the Act.

(2) Work and services that are a part of operational and maintenance activities or which, being very closely and directly involved therewith, are more in the nature of operational activities than construction, alteration, and/or repair work. This includes work and services which would involve a material risk to continuity of operations, to life or property, or to DOE operating requirements, if performed by persons other than the operating contractor's regular production and maintenance forces, provided, however, that any decision that contracts or work items are noncovered for these reasons must be made by the Head of the Procuring Activity and the authority to make such a decision cannot be redelegated.

(3) Assembly, modification, setup, installation, replacement, removal, rearrangement, connection, testing, adjustment, and calibration of machinery and equipment. It should be noted, however, that these activities are covered if they are part of or would be a logical part of a contract for the construction of a facility, or if construction type work, other than defined as "incidental" in §9-18.701-51(c) is involved.

(4) Experimental development of equipment, processes and devices, including assembly, fitting, installation, testing, reworking, and disassembly. This refers to equipment, processes and devices which are assembled for the purpose of conducting a test or experiment. The design may be only conceptual in character, and professional personnel responsible for the experiment participate in the assembly. Specifically excluded from the category of experimental development are buildings and building utility services—as distinguished from temporary connections thereto. Also specifically excluded from this category is equipment to be used for continuous

testing, e.g., a machine to be continuously used for testing the tensile strength of structural members. (See §9-18.750-2(g) and 2(h)).

(5) Experimental work in connection with peaceful uses of nuclear energy. This refers to equipment, processes and devices which are assembled and/or set in place and interconnected for the purpose of conducting a test or experiment. The nature of the test or experiment is such that professional personnel responsible for the test or experiment and/or data to be derived therefrom necessarily must participate in the assembly and interconnections. Specifically excluded from experimental work are buildings, building utility services, structural changes, drilling, tunneling, excavation, and backfilling work which can be performed according to customary drawings and specifications, and utility services or modifications to utility services—as distinguished from temporary connections thereto. Work in this category may be performed in mines or in other locations specifically constructed for test or experiments. (See §9-18.750-2(g) and 2(h)).

(6) Emergency work to combat the effects of fire, flood, earthquake, equipment failure, accident or other casualties, and to restart the operational activity following the casualty. Work which is not directly related to restarting the activity or which involves rebuilding or replacement of structure or structural components or equipment is excluded from this category. (See §9-18.750-2(g) and 2(h)).

(7) Decontamination, including washing, scrubbing, and scraping to remove contamination; removal of contaminated soil or other material; and painting or other resurfacing, provided that such painting or resurfacing is an integral part of the decontamination activity and does not include complete replacement of large sections of paved areas or roadways.

(8) Burial of contaminated soil waste or contained liquid; however, initial preparatory work readying the burial ground for use (for example, any grading or excavating that is a part of initial site preparation, fencing, drilling wells for continued monitoring of contamination, construction of guard or other office space) is covered. Likewise, work subsequent to burial which involves the placement of concrete or other like activity is covered.

(b) The classification of a contract as a contract for operational or maintenance activities does not necessarily mean that all work and activities at the contract location are classifiable as outside of Davis-Bacon Act coverage, since it may be necessary to separate out work which should be classified as covered. Therefore, Heads of Procuring Activities shall establish and maintain controls for the careful scrutiny of proposed work assignments under such a contract to assure that:

(1) Contractors whose contracts do not contemplate the performance of covered work with the contractor's own forces are neither asked nor authorized to perform work within the scope of the Davis-Bacon Act. If the actual work assignments do involve covered work, the contract should be modified to include applicable provisions of the Davis-Bacon Act.

(2) Where covered work is peformed by a contractor whose contract contains provisions required by the Davis-Bacon Act, such work is performed as required by law and the contract. After such contractor has been informed, as provided in paragraph (b)(3) of this section, that certain work is covered work, the Head of the Procuring Activity's responsibility to assure compliance is the same as it would be if the work were being performed under a separate construction contract.

(3) Controls provided for above include consideration by the Head of the Procuring Activity and the contractor, before work is begun or contracted out, of the relation of the Davis-Bacon Act to (i) the annual programing of work, (ii) the contractor's work orders, and (iii) work contracted out in excess of $2,000. The Head of the Procuring Activity may, if he concludes that it is consistent with DOE's responsibilities as described in this section, prescribe from time to time classes of work as to which applicability or nonapplicability of the Davis-Bacon Act is clear, for which he will require no further DOE determination on coverage in advance of the work. For all work, the controls to be established by the Head of the Procuring

Activity should provide for notification to the contractor before work is begun as to whether such work is covered.

§9-18.702 Statutory and regulatory requirements.

§9-18.702-50 Reserved.

§9-18.704 Wage determinations.

§9-18.704-3 Procedure for requesting determinations.

The Heads of the Procuring Activities are responsible for submitting to the Wage and Hour Division, Employment Standards Administration, Department of Labor, Washington DC 20210, all DOE requests for project area or installation wage determinations, or individual determinations, or extensions or modifications thereto. Requests for such determinations shall be made on Standard Form 308, at least 30 calendar days before they are required for use in advertising for bids or requests for proposals.

§9-18.704-50 Use and duration of wage determinations.

In general, the Davis-Bacon Act rates applicable to a contract at the time it is awarded continue in effect during its term regardless of whether it is a fixed-price or cost-type contract. However it should be noted that:

(a) The minimum wage rates that will be paid to laborers and/or mechanics engaged on jobs which are programmed on a fiscal year or shorter basis are those predetermined by the Secretary of Labor to be prevailing as of the date the program is approved by DOE for performance by the contractor. However, in the event of a substantial addition to the scope of a contract containing a "general or area wage determination," the current "general or area wage determination," including modifications thereto, shall be made applicable to the additional work. If the contract contains a "project area or installation (54A) determination," or an "individual determination," and a substantial addition to the scope of the contract is made during the fiscal year or shorter basis but more than 120 days from the date of the determination, a new determination is required for the substantial addition. Programmed work will be performed by the contractor under the following conditions:

(1) Continuing contracts for minor or miscellaneous construction, alteration and/or repair, including painting and decorating; or

(2) Contracts for operation and maintenance under which the contractor will perform miscellaneous covered work with his own forces;

(b) The minimum wage rates that will be paid to laborers and/or mechanics engaged on subcontracts let by an operating contractor will be those in the wage determination decision of the Secretary of Labor which is current as of the date the contractor enters into such subcontract.

(c) See FPR 1-18.704 for types of wage determinations procedures for requesting same, and review of the FEDERAL REGISTER on general or area wage determinations.

§9-18.705 Administration and enforcement.

§9-18.705-50 Responsibilities.

(a) The statutes and regulations cited and summarized in FPR 1-18.702 and the requirements in FPR 1-18.705, impose direct responsibilities for administration and enforcement upon DOE. Therefore, Heads of Procuring Activities and others, consistent with their assignments of responsibilities and delegations of authority, shall assure that DOE contract activities are carried out consistent with these laws and regulations.

(b) Heads of Procuring Activities shall submit to the Office of Contractor Industrial Relations required reports, recommendations, and requests for rulings and interpretations as required in FPR 1-18.705.

§9-18.750 Decisions and other guides in difficult areas.

§9-18.750-1 General.

Section 9-18.701-52 necessarily uses general language and in some cases the application of the criteria discussed therein to particular situations may not be clear. Therefore, this subsection covers more specifically some of the areas of particular concern to DOE and is promulgated to clarify the application of the criteria.

§9-18.750-2 Specific examples.

The following are applications of the regulations to particular situations. Additional narrative statements describing items of work and applicabilty of the Davis-Bacon Act will be developed from time to time and added to this subsection.

(a) Land-based prototypes. The Labor Department has held that the construction of a full-scale operating prototype of one reactor compartment and of all necessary nuclear power components, systems, and propulsion equipment for a submarine is covered.

In another ship prototype situation, the Department has held that assembling and fitting the components of nuclear steam propulsion units into the hull sections, including installation of the pressure vessels, turbo-generator sets, heat exchangers, control wiring, etc., is covered.

A later decision involving the same prototype indicates that the earlier rulings should not be construed as intended to cover all equipment assemblies irrespective of the status of construction and other pertinent factors.

(b) Paving. The construction of roads, including grading, and their repair—where such repair includes work on roadbeds before resurfacing, building up shoulders, forming ditches, culverts and bridges, and on the actual resurfacing of roads—is covered. However, recurring-type maintenance work, such as patching surface, filling chuck holes, patching shoulders, and resurfacing railroad crossings is noncovered. Similarly, patch and maintenance work on a parking lot the replacement of bumper stops, and the repainting of parking deviders is non-covered.

(c) Stationary boilers. The construction, alteration and/or repair, including installation and rebuilding, of stationary boilers costing in excess of $2,000 for labor and materials is covered. In contrast, inspection may reveal need for replacement of pieces of insulation, individual tubes, or other defective parts. Such minor maintenance, necessary to keep the boiler in safe operating condition, is non-covered.

(d) Start-up of operating activity after fire or other catastrophe. Rebuilding of plant following a catastrophe, such as replacement of structural members, roof trusses, walls, roof, utility services, and process piping is covered. However, where process equipment can be restarted and/or operational activities resumed prior to such rebuilding, the actual work of start-up, including preliminary activity, e.g., cleaning, drying, checking, adjustment, temporary services, and temporary weather protection of equipment, essential to such resumption of operational activity, is noncovered.

(e) Rehabilitation of facilities. By contrast with emergency services needed to restore or maintain functional usefulness, as above described, rehabilitation (e.g., painting, change-out, rearrangement and installation of equipment, replacement or repair of damaged parts of a structure or of building services or equipment) of a facility is covered. In such rehabilitation, the startup of equipment by operating employees is noncovered.

(f) Painting. Although painting and decorating are specifically mentioned in the Act, painting which is closely integrated within operation and maintenance activities and such repainting as color coding of process lines and service piping (including valves and directional arrows), is noncovered; likewise, application of various materials for localizing contamination, painting of machine tools to identify degree of contamination, and preventive maintenance such as repainting of machine tools, equipment and plant structures are noncovered when performed with a stable work force employed by the operating contractor. When painting involves more than touch up to structures or facilities the work would be covered by Davis Bacon.

(g) Installation, rearrangement or adjustment of equipment. (See also paragraph (h). Experimental installations, of this section.)

(1) During construction. In the construction of a new facility—whether it is a production plant, a laboratory, or supporting facilities, such as shops and warehouses—an integral part of a construction project is the installation of equipment (including mechanical equipment, building services, instruments, etc.) which permits the facility to be utilized for the purpose for which it was intended. Normally, the initial installation, arrangement, adjustment, balancing, calibration, and checking of such equipment is a logical part of the construction contract(s) for completion of the facility and, whether or not included within the scope of such contract(s), is covered.

(2) Plant start-up. At the time of the turnover of a DOE facility (which frequently differs in many respects from other facilities), from construction to operation activities, if the facility is turned over a section at a time, some problems of coverage may arise. It is extremely difficult, if not impossible, to write rules or criteria that can be practically applied in all situations. Usually, it is essential that final checkout of a plant prior to the start-up of plant operations be performed by personnel of the operating contractor and, as such, is not covered. The important thing is to work out a practical plan that will assure: (i) safe and effective startup of the facility, (ii) the fulfillment of obligations under applicable statutes, and (iii) continuing construction at the facility.

(3) Equipment and equipment assemblies. While the current construction status of a public building or public work is not controlling as to coverage of supply-installation-type contracts, this is a factor to be considered in judging the applicability of the Davis-Bacon Act. The Labor Department has ruled (Walsh-Healey Rulings and Interpretations No. 3, section 6(b)) that while contracts in excess of $10,000 for equipment, including erection or installation, are subject to the Walsh-Healy Act, they may be also covered under the Davis-Bacon Act where more than an incidental amount (see §9-18.701-51(c)) of work is involved. Examples given in this ruling include furnishing and installation of mechanical equipment such as elevators or of generators requiring prepared foundations or housing. In a specific situation, the Department has indicated that a contract for furnishing the initial installation of piping, wiring, gas exhaust fans, plumbing, sheet metal work, and related activities to install kitchen baking equipment was comparable to the basic plumbing, wiring, and heating contracts and was covered.

While this situation involves an initial installation, alteration or rearrangement of existing facilities involving such work to accommodate new or different equipment is also covered. Conversely, it follows that where the test of more than an incidental amount of construction is not met, and where the installation, rearrangement or adjustment of equipment is not a logical part of any current related construction project, it is noncovered.

(4) Telephone and utility systems. Contracts involving the installation of telephone systems or utilities are not covered when the work is performed by employees of the telephone or utility company supplying the services, and the material and equipment installed is owned by the telephone or utility company. Such installation is considered to be an extension of the utility's services. However, a contract for a telephone central system to be installed by the manufacturer and owned by the United States has been held to be covered. In addition, relocation of utility lines to accommodate construction of a public work is covered.

(h) Experimental installations. Within DOE programs, a variety of experiments are conducted involving materials, fuels, coolants, processes, equipment, etc. Certain types of situations where tests and experiments have sometimes presented coverage questions are described below.

(1) Set-ups of device and/or processes. The proving out of investigative findings and theories of a scientific and technical nature for extension into practical application may require the set-up of various devices and/or processes at an early or preprototype stage of development. These may vary from laboratory bench size, upwards. As a rule, these set-ups are made within established facilities (normally laboratories); required utility connections are made to services provided as a part of the basic facilities; and the activity as a whole falls within the functional purpose of the facility. Such set-ups are generally not covered. However, the erection of structures which are public works is covered if construction work, other than an "incidental amount" as defined in §9-18.701-51(c) is involved. Preparatory work for the set-up requiring structural changes or modifications of basic utility services—as distinguished from connections thereto—is covered. Illustrative of noncovered set-ups of devices and/or processes are the following:

(i) Assembly of piping and equipment within existing "hot cell" facilities for proving out a conceptual design of a chemical processing unit;

(ii) Assembly of equipment, including adaptation and modification thereof, in existing "hot cell" facilities to prove out a conceptual design for remotely controlled machining equipment;

(iii) Assembly of the first graphite pile in a stadium at Stagg Field in Chicago;

(iv) Assembly of materials and equipment for particular aspects of the direct current thermonuclear experiments to explore feasibility and to study other ramifications of the concept of high energy injection and to collect data thereon.

(2) Loops. Many experiments are carried on in equipment assemblies called loops in which liquids or gases are circulated under monitored and controlled conditions. For purposes of determining Davis-Bacon coverage, loops may be classed as loop facilities or as loop set-ups. Both of these classes of loops can include in-reactor loops and out-of-reactor loops. In differentiating between clearly indentified loop set-ups and loop facilities, an area exists in which there have been some questions of coverage, such as certain loops at the Material Test Reactor and Engineering Test Reactor at the National Reactor Test Site. Upon clarification of this area, further illustrations will be added. In the meantime, the differentiation between loop set-ups and loop facilities must be made on a case-by-case basis, taking into account the total criteria set forth in this subpart.

(i) Loop set-ups. The assembly, erection, modification, and disassembly of a loop set-up is noncovered. A noncontroversial example of a loop set-up is one which is assembled in a laboratory, e.g., Oak Ridge National Laboratory, Argonne National Laboratory, and Lawrence Livermore Laboratory, for a particular test and thereafter disassembled. However, preparatory work for a loop set-up requiring structural changes or modifications of basic utility services—as distinguished from connections thereto—is covered as are material and equipment that are installed for a loop set-up which is a permanent part of the facility or which is used for a succession of experimental programs.

(ii) Loop facilities. A loop facility differs from a loop set-up in that it is of a more permanent character; usually, but not always, of greater size; normally involves the building or modification of a structure; sometimes is installed as a part of construction of the facility; and may be designed for use in a succession of experimental programs over a longer period of time. Examples of loop facilities are the in-reactor "K" loops at Hanford and the large Aircraft Nuclear Propulsion loop at National Reactor Test Site. The on-site assembly and erection of such loop facilities are covered. However, once a loop facility is completed and becomes operational, the criteria set forth above for operational and maintenance activities apply.

(3) Reactor component experiments. Other experiments are carried on by insertion of experimental components within reactor systems without the use of a loop assembly. Illustrative of reactor facilities erected for such experimental purposes are the special power excursion test reactors at the National Reactor Test Site, which are designed for studying reactor behavior and performance characteristics of certain reactor components. Such a facility may consist of a reactor vessel, pressurizing tank, coolant loops, pumps, heat exchangers, and other auxiliary equipment as needed. The facility also may include sufficient shielding, to permit work on the reactor to proceed following a short period of power operation, and buildings as needed to house the reactor and its auxiliary equipment. The erection and on-site assembly of such a reactor facility is covered work, but the components whose characterisitics are under study are excluded from coverage. To illustrate, one of the SPERTs planned for studies of nuclear reactor safety is designed to accommodate various internal fuel and control assemblies as required to conduct a particular test. Accordingly, the internal structure of the pressure vessel is so designed that cores of different shapes and sizes may be placed in the vessel for investigation, or the entire internal structure may be easily removed and replaced by a structure which will accept a different core design. Similarly, the control rod assembly is arranged to provide for flexibility in the removal of instrument leads and experimental assemblies from within the core.

(4) Tests or experiments in peaceful uses of nuclear energy. These tests or experiments are varied in nature and some are only in a planning state. These tests or experiments consist of a single or series of nuclear or nonnuclear detonations for the purposes of acquiring data. The data can include seismic effects, radiation effects, amount of heat generated, amount of material moved and so forth. Some of these tests are conducted in existing mines, while others are conducted in locations specifically constructed for the tests or experiments. In general, all work which can be performed in accordance with customary drawings and specifications, as well as other work in connection with preparation of facilities is treated as covered work. Such work includes tunneling, drilling, excavation and backfilling, erection of buildings or other structures, and installation of utilities. The installation of the nonnuclear material or nuclear device to be detonated, and the instrumentation and connection between such material or device and the instrumentation are treated as noncovered work.

(5) Tests or experiments in military uses of nuclear energy. As in the case in §9-18.750-2(h)(4), these tests or experiments can be varied in nature. However, under this category it is intended to include only detonation of nonnuclear material or nuclear devices. The material or devices can be detonated either underground, at ground level, or above the ground. These tests or experiments have been conducted in, on, or in connection with facilities specifically constructed for such tests or experiments. As is the case with respect to tests or experiments in peaceful uses of nuclear energy, all work which can be performed in accord with customary drawings and specifications, as well as other work in connection with preparation of facilities are treated as covered work. Such work includes building towers or similar structures, tunneling, drilling, excavation and backfilling, erection of buildings or other structures, and installation of utilities. The installation of the nonnuclear material or nuclear device and instrumentation are treated as noncovered work.

(i) Construction site contiguous to an established manufacturing facility. As DOE-owned property sometimes embraces several thousands of acres of real estate, a number of separate facilities may be located in areas contiguous to each other on the same property. These facilities may be built over a period of years, and established manufacturing activities may be regularly carried on at one site on the property at the same time that construction of another facility is underway at another site. On occasion, the regular manufacturing activities of the operating contractor at the first site may include the manufacture, assembly, and reconditioning of components and equipment which in other industries would normally be done in established commercial plants. While the manufacture of components and equipment in the manufacturing plant is noncovered, the installation of any such manufactured items on a construction job is covered.

Subpart 9-18.50 Rental of Construction Equipment

§9-18.5000 Scope of subpart.

This subpart sets forth general policy and instructions which shall be applied to rental of construction equipment for use by DOE contractors with cost-reimbursement type contracts.

§9-18.5001 General policy.

It is the policy of the DOE:

(a) To use presently owned DOE construction equipment to the fullest extent. Careful investigation shall be made of the equipment available, not only at the field office concerned, but at other field offices, to determine whether such equipment can be economically utilized on the job. The Senior Procurement Official, Headquarters or designee, can assist in the investigation of excess equipment available in other offices.

(b) To rent construction equipment, where available, rather than purchase it, unless in the case of third-party-owned equipment, the field office determines that accrued rentals on a particular item of equipment will approximate the cost of ownership of it except, however, that individual items of construction equipment having an original cost of less than $1,000 ordinarily should be purchased and not rented. Where it is clearly to the advantage of the Government, items having a cost of less than $1,000 may be rented with the approval of the Head of the Procuring Activity. Whenever it is practical, cost and other factors considered, contractor-owned equipment shall be rented in preference to renting third-party-owned equipment.

(c) To pay rental for construction equipment at rates not higher than those prevailing in the locality, except under unusual circumstances, and at as low a rate as is consistent with securing modern equipment in good operating condition. Costs of repair, job interruption due to poor equipment, transportation and in-transit rental may well offset any apparent savings in rental rates. Rental paid shall be subject to any Government price ceiling regulations that may be in effect.

§9-18.5002 Rental of contractor-owned equipment.

§9-18.5002-1 Rental agreements.

The terms and conditions governing rental by DOE of construction equipment from a prime cost-type construction contractor are set forth in §9-16.5002-2, Outline of agreement for rental of contractor-owned construction equipment. This form of agreement is designed for use as an appendix to a DOE cost-type construction contract. It may be modified for rental of equipment under other contractual arrangements, such as an operating contractor renting from a cost-type construction subcontractor, and it may be modified for use as a separate contract or as an attachment to a subcontract. Some of the aspects of this agreement to which particular attention should be given are set forth in §9-18.5002-2 and §9-18.5002-3.

§9-18.5002-2 Rental period.

The base rental period shall extend from the time the equipment is accepted at the job site until the contractor is notified in writing by DOE's representative that the equipment is no longer required. Subject to applicable limitations covered in the rental agreement form, the contractor shall be paid rental during the in-transit time and during the time required for equipment repair or replacement prior to return to the contractor.

§9-18.5002-3 Rental rates.

(a) Rates for rental of contractor-owned equipment shall be fair and equitable. The rental rates contemplate that DOE will pay incoming and outgoing transportation costs and rental during in-transit time for both inbound and outbound transportation of equipment; however, terms more favorable to DOE may be negotiated where appropriate. The rental rates to be paid for the use of contractor-owned equipment under normal conditions should not exceed 65 percent of the rates quoted in the latest edition of the Associated Equipment Distributor's (A.E.D.) "Compliiation of Average Rental Rates for Construction Equipment." However, Heads of Procuring Activities may approve rates in excess of 65 percent of the current A.E.D. schedule when local conditions require higher rates. When it becomes necessary as a general practice to exceed 65 percent of the current A.E.D. schedule, Heads of the Procuring Activities shall be advised.

(b) For items of equipment that are not covered by the A.E.D. schedule, use the latest edition of "Contractors' Equipment Ownership Expense" document published by The Associated General Contractors of America, Inc., and information on prevailing local rates for developing rates that would be consistent with the 35 percent reduction in the A.E.D. rates (i.e., taking into consideration the expenses paid by the Government under the rental agreement).

§9-18.5002-4 Application of rates.

The rental rates shall be applied in accordance with the following rules:

(a) Basis of rates. The rates shall be based upon one shift of 8 hours per day, 40 hours per week, or 176 hours per month of a 30-consecutive-day period.

(b) Apportionment of rates. The monthly rate and its pro-rata shall apply to all rental periods of 1 month or more. The weekly rate and its pro-rata share shall apply to all rental periods of 1 week or more up to 1 month. The daily rate and its pro-rata share shall apply to all rental periods up to 1 week.

(c) Overtime. Inasmuch as there are certain elements of cost to an equipment owner which do not change even though the equipment is used on more than one shift per day, it is believed equitable to pay a lower rental rate during a second and third shift than would be paid during a single shift. Therefore, the rental agreement form provides for payment for overtime at a rate equal to one-half the rate for the first shift.

§9-18.5002-5 Insurance.

(a) Generally, rental rates should include the cost of insurance or self-insurance covering loss of or damage to the equipment during rental periods. The rental agreement for contractor-owned equipment is so worded.

(b) However, if the Contracting Officer determines that it is not practical to include the cost of such insurance in the rental rates, paragraphs 3(d) and 7(a) shall be amended as indicated in the applicable notes following these paragraphs in §9-16.5002-2.

§9-18.5002-6 Rental limitation.

The rental agreement form provides that when the total amount of rental paid to the contractor for any one unit of equipment equals 75 percent of the mutually agreed value of that unit, as set forth in the initial inspection report, the equipment is to remain available for the work under the construction contract as long as it will be required without any further rental payments to the contractor. The rental ceiling of 75 percent of the agreed-upon value of the equipment applies to all rental paid, including rental paid during intransit time to and from the site of the work and down time for any operating repairs or restoring of the equipment after it is no longer needed at the site. The purpose of this provision is to prevent the Government from paying rental in excess of the contractor's investment, and is included in lieu of an "option to purchase" clause. Once a particular piece of equipment has been released, the contractor will be required to return it to the job under the original rental period.

§9-18.5002-7 Record of negotiation.

The record of negotiation shall set forth the information used to determine the reasonableness of the rental rates, including a breakdown of the contractor's equipment ownership expense, similar to that itemized in The Associated General Contractors of America's document, "Contractors' Equipment Ownership Expense."

§9-18.5002-8 Responsibility for repair and replacement.

The rental agreement describes the responsibilities of the parties with respect to maintenance and repair necessary to the operation of the rented equipment, or replacement of such equipment. DOE's responsibility includes repairs resulting from normal wear and tear, provided they were necessary in order to continue the equipment in service. However, when the equipment is no longer required on the job, the extent of DOE's obligation is only to return the equipment to the contractor in as good operating condition as when received, less normal wear and tear.

§9-18.5002-9 Equipment condition and inspection.

(a) Inspection. Construction equipment shall be given a rigid and detailed inspection by representatives of DOE and, at the contractor's option, by representatives of the contractor, before its shipment and acceptance or use on the job. Equipment shall be inspected under actual workloads insofar as practicable. In cases where it is not practical to inspect equipment prior to its shipment to the job site, the contractor should be informed of the extent of inspection and the expected condition of his equipment in the event the equipment does not meet required standards. The transportation, rental, or any other expenses shall be paid by DOE unless, at contractor's expense, the equipment is repaired to acceptable standards in a reasonable length of time. A similar inspection shall be made immediately prior to scheduled return shipment of an item of equipment.

(b) Inspection report. The detailed inspection report shall follow in general §9-16.5002-4 - Outline of inspection report of equipment, and shall be signed by each representative inspecting. The initial inspection report shall be used at the time of release as a basis of determining the repairs necessary to place the equipment in as good operating condition as when accepted, less normal wear and tear. After necessary repairs are completed, a final inspection report shall be completed by representatives of DOE and, at his option, the contractor.

(c) Trial period and defects. If initial detailed inspection discloses that the condition of the equipment is doubtful, arrangements should be made with the contractor for a trial period of operation to prove the equipment, with provision that if equipment is found unacceptable in the trial period, no rental, transportation, or other expenses will be due the contractor. Repairs to equipment which fails in service due to defects not reasonably ascertainable on initial inspection shall be at the contractor's expense.

§9-18.5003 Rental of third-party-owned equipment.

§9-18.5003-1 Rental agreement.

The terms and conditions governing rental of construction equipment without operators from a third party are in accordance with §9-18.5002-2, §9-18.5002-4, §9-18.5002-8, and §9-18.5002-9, and are set forth in §9-16.5002-3—Outline of agreement for rental of third-party-owned construction equipment. Heads of Procuring Activities shall assure that these terms and conditions are used by DOE cost-type construction contracts and that similar terms and conditions are used by other DOE cost-type contractors or subcontractors in renting construction equipment from a third party. These terms and conditions may be suitably modified to provide for rental of equipment with operators. Some of the aspects of this agreement to which particular attention should be given are set forth in the next three subparts.

§9-18.5003-2 Rental rates.

Third-party equipment shall be rented on the basis of competitive bids, rental rates, transportation costs, and other factors being considered. The rental specifications shall be based on the circumstances of a particular case, including the length of rental period, the availability of equipment in certain localities, and the work requirements.

§9-18.5003-3 Insurance.

The provisions of §9-18.5002-5(a) also apply to the rental of construction equipment from a third party. However, if the Contracting Officer determines that the rental rates are not to include the cost of insurance or self-insurance covering loss of or damage to the equipment, Articles III(d) and VII(a) of the rental agreement shall be amended as indicated in the applicable notes following these articles in §9-16.5002-3—Outline of agreement for rental of third-party-owned construction equipment.

§9-18.5003-4 Option to purchase equipment.

When accrued rentals on a particular item of equipment will likely approximate the appraised value of equipment and a decision has been made not to purchase in accordance with §9-18.5001(b), consideration shall be given to including in the rental agreement, an option to purchase the equipment.

Subpart 9-18.51 Inspection and Acceptance

§9-18.5100 Scope of subpart.

This subpart implements and supplements FPR 1-14 by prescribing the policies and requirements for inspection and acceptance under construction contracts.

§9-18.5120 Construction contracts.

(a) Inspection services may be performed by the architect-engineer responsible for the design. Inspection services may not be procured from a fixed-price construction contractor with respect to its own work. Under cost-reimbursement type contracts where the construction contractor and architect-engineer are the same, some degree of self-inspection may be permitted but shall not constitute final inspection and acceptance by the Government.

(b) When one contractor is to inspect the work of another, the inspecting contractor will be given written instructions defining its responsibilities and stating that he is not authorized to: modify the terms and conditions of the contract, to direct additional work, to waive any requirements of the contract, nor to settle any claim or dispute. Copies of the instructions will be given to the contractor who is to be inspected, with a request to acknowledge receipt on a copy to be returned to the Contracting Officer. In this manner, both contractors are on express notice of the authority and limitations on the authority of the inspecting contractor.

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PART 9–23 SUBCONTRACTING POLICIES AND PROCEDURES

§9–23.000 Scope of part.

This part sets forth policies and procedures for the evaluation, review, and approval of contractors' procurement systems. Reliance upon a contractor's approved procurement system will usually eliminate the need for reviewing and approving or consenting to most individual subcontracts. However, programmatic and other considerations still will require Government involvement at an early stage in the planning of procurement actions and approval of some subcontracts.

Subpart 9–23.1 Review of Contractors' Procurement Systems

§9–23.100 Scope of subpart.

This subpart sets forth the requirements for conducting contractor procurement system reviews (CPSRs).

§9–23.101 Objectives.

The objectives of the reviews are to provide:

(a) A means for evaluating the efficiency and effectiveness with which the contractor manages the procurement function in spending Government funds;

(b) The basis for the Contracting Officer to grant, continue, withhold, or withdraw approval of the contractor's procurement system;

(c) Reliable current information on the contractor's procurement system for use in source selection, determining the appropriate type of contract, estimating contract costs, and establishing profit or fee objectives; and

(d) Current procurement system information for appropriate DOE activities.

§9–23.102 Responsibilities.

(a) DOE Contracting Officers or designee, will conduct CPSRs of DOE cognizant contractors.

(b) The Department of Defense normally will conduct CPSRs for other than DOE cognizant contractors.

(c) The Senior Procurement Official, Headquarters is responsible for the overall conduct of the DOE-wide CPSR program.

§9–23.103 Definitions.

(a) The term "contractor", as used in this part, refers to a "prime contractor" or "subcontractor" and means a separate entity of a contractor, such as an affiliate, division, or plant, which performs its own purchasing.

(b) DOE cognizant contractors are those contractors over which DOE has cognizance as identified in FMC 73–6, or where DOE has the preponderance of Government business. Included are operating contractors and pilot and demonstration plant contractors.

§9-23.104 Review criteria.

(a) A CPSR is an evaluation of a contractor's procurement system and the effectiveness with which procurements are placed in the performance of Government contracts. It is not limited to a specific Government contract.

(b) A CPSR will be initiated when the Contracting Officer determines that the nature or extent of subcontracting warrants. Generally, a CPSR shall be performed if the contractor is expected, within the next 12 months, to have in excess of $5,000,000 subcontracting with Government funds under other than prime contracts awarded on the basis of adequate price competition as defined in FPR 1-3.807-1(b)(1). (For the purpose of this paragraph, contract modifications are not considered to be competitively awarded). Contractor Procurement System Reviews, CPSR, should not ordinarily be performed for subcontractors unless, in addition to the criteria for conducting a CPSR on a prime contractor, the following criteria are also satisfied: (a) The preponderance of the sales of the subcontractor is to the Federal Government, and (b) both the prime contractor and the subcontractor agree to the performance of a CPSR.

(c) The procurement systems of contractors meeting the criteria in (b) above, shall not be reviewed if the Contracting Officer determines, in writing, and the Director, Office of Policy, (attn. PR-20) agrees that the extent or nature of the subcontracting will not justify the cost of the CPSR. In exceptional cases, a contractor not meeting the criteria in (b) above, may be reviewed if the Contracting Officer determines that the facts warrant such action.

(e) CPSRs will be conducted in accordance with the appropriate agency directives and guides.

(f) An outline of the proposed CPSR review, including the time schedule, composition, and assignments of the review team, shall be forwarded to the Director, Office of Policy, (attn. PR-20). Initial and follow-up review teams should include, when available, a DCAS representative and a representative from Procurement and Assistance Management as well as other DOE representatives as may be appropriate.

§9-23.105 Types of review.

§9-23.105-1 Initial reviews.

An initial review shall be conducted when the contractor meets the criteria in §9-23.104. It shall be a complete evaluation as described in §9-23.106.

§9-23.105-2 Subsequent reviews.

If a contractor's procurement system is approved, the Contracting Officer shall determine annually, the need for a subsequent review if it still meets the criteria in §9-23.104. A subsequent review may be limited to specific areas, but shall include sufficient consideration of each of the factors listed in §9-23.106(a) to establish the current adequacy or inadequacy of the entire system. Such review shall generally be conducted in order to:

(a) Examine changes instituted since the previous review;

(b) Ascertain the status of prior recommendations upon which action has not been completed; and,

(c) Determine whether the contractor's procurement system, especially the significant cost impact areas, warrants continued approval. Subsequent reviews shall be performed no less often than every two years.

§9-23.105-3 Special reviews.

After approval of the contractor's procurement system, the Contracting Officer may initiate special reviews in connection with weaknesses revealed as a result of:

(a) The initial or subsequent review;

(b) The review of subcontracts submitted under the notification requirement of contract clauses;

(c) Changes in the contractor's procurement policies, procedures, or personnel;

(d) Changes in plant workload or type of work; or

(e) Information provided by Government personnel.

In conducting such reviews, the same effectiveness criteria used in previous reviews shall be applied to the area being examined.

§9-23.105-4 Follow-up reviews.

If approval of a contractor's procurement system is withheld or withdrawn, a follow-up review shall be made as soon as evidence is received from the contractor that the factors leading to such action have been corrected. Whether this review consists of a complete reexamination of the contractor's procurement system or is confined to the areas found deficient, shall be a matter of judgment and will depend on the time lapse between the notice to the contractor of withholding or withdrawal of approval and the follow-up review.

§9-23.106 Extent of review.

(a) Generally, a review shall consist of a complete evaluation of the contractor's procurement system. This review shall be made in accordance with the appropriate DOE directives and guides, and shall give attention to:

(1) The degree of competition obtained;

(2) Pricing policies and techniques, including methods of obtaining accurate, complete, and current cost or pricing data, and certification as required;

(3) The methods of evaluating subcontractors' responsibilities;

(4) The treatment accorded affiliates and other concerns having close working arrangements with the contractor;

(5) The extent to which assurance is obtained that principal subcontractors apply sound pricing practices and have a satisfactory procurement system in dealing with lower-tier subcontractors;

(6) The appropriateness of the types of subcontract used;

(7) Practices pertaining to small and socially and economically disadvantaged businesses, labor surplus area, and other socio-economic programs;

(8) Attention given to the management of significant subcontract programs;

(9) The contractor's procurement policies and procedures pertaining to such items as "make-or-buy" program, control of property, obtaining of warranties, and organizational conflicts of interest;

(10) Compliance with cost accounting standards in award and administration of subcontracts;

(11) Effectiveness of policies and procedures; and

(12) Effectiveness of subcontract close-out actions, policies and procedures.

(b) In reviewing the contractor's procurement system, a determination shall be made as to whether subcontracting is done competitively to the maximum practicable extent. This requires ascertaining whether:

(1) A sufficient number of sources are solicited; and

(2) Subcontracting procedures provide other elements needed for adequate and effective competition, including:

(i) Adequate descriptions of any factors to be evaluated; and

(ii) Evaluation of all offers on a common basis.

(c)Decisions as to whether commercial items conform to the purpose and intent of the exemption from the requirement for submitting and certifying current cost or pricing data shall be analyzed.

§9-23.107 Review of CPSR Reports.

(a) The findings and recommendations of the review team (the CPSR Report) shall be approved by the Director, Office of Policy (attn: MA-933) before the Contracting Officer determines to continue, grant, withhold, or withdraw approval. Determinations to continue approval after a subsequent review or to revise subcontract consent thresholds under approved systems may be made without submitting a request for approval to Headquarters; however, in these instances an information copy of the material described in (b) shall be submitted.

(b) Two copies of the CPSR report shall be furnished to the Director, Office of Policy (attn. PR-20), who will consult with appropriate organizations in performance of his review. The submittal shall include:

(i) An outline of the actions planned as a result of the review;

(ii) A draft of whatever correspondence will be issued to the contractor as a result of review;

(iii) A description of the present and any proposed revisions to subcontract notice/consent/approval dollar thresholds or other limitations;

If revisions are to be made to subcontract dollar thresholds or other limitations;

(A) A stratification of the present subcontract review workload, including average workhours expended and lead times experienced in processing requests for subcontract consent and;

(B) An evaluation of the anticipated benefits including average workhours and lead times saved in processing requests for subcontract consent.

§9-23.108 Granting, continuing, withholding, and withdrawing approval.

(a) The Contracting Officer is responsible for granting, continuing, withholding, or withdrawing approval of a contractor's procurement system subject to the requirements of §9-23.107(a). The Contracting Officer shall approve a procurement system only after a CPSR discloses that the contractor's procurement policies and practices are effective and provide adequate protection of the Government's interests. Approval of a system shall be withheld if there are major weaknesses or if the contractor is unable to provide sufficient information upon which to base an affirmative determination. An approval may be withdrawn at any time on the basis of a determination that there has been a deterioration of the contractor's procurement system, or otherwise to protect the interest of the Government.

(b) The Contracting Officer shall give the contractor written notice granting, continuing, withholding, or withdrawing approval of the procurement system. If the contractor's system is approved, the notification of approval shall include:

(1) The effective date of the approval;

(2) The plant, plants, divisions, or facility of the company that are approved;

(3) The period that the approval covers (usually one year, maximum two years);

(4) The extent of applicability (usually all DOE contracts with the approved facility administered by the involved procurement office, all such DOE contracts administered by other DOE procurement offices when the cognizant Contracting Officer concurs);

(5) Any special conditions or requirements for notification to or consent or approval by the Contracting Officer (such as intracompany transfers, critical or programmatically important subcontracts);

(6) Other conditions such as:

(i) Contract terms that need to be changed; and

(ii) Advice that termination of approval will occur upon a change in the procurement system unless approved by the Contracting Officer; and

(7) A statement that approval may be withdrawn at any time at the Government's discretion.

(c) The effect of the approval; (any increase in dollar or any other limitations) will be based upon the degree of confidence in the contractor's procurement system as determined through the review and the need to maintain a review of the most significant subcontracts, subject to the limitations in §9-50.302-5(b).

(d) Approval of a contractor's procurement system does not offset the requirement for advance notification except as set forth in §9-3.901.

(1) Advance notification for information purposes is required in the following instances:

(i) Noncompetitive procurements over $25,000

(ii) Intracompany transfers or payments over $10,000; and

(iii) Direct reimbursement of costs over $500.

(2) The advance notice shall contain, as a minimum, a description of work, estimated cost, type of contract or reimbursement provisions, and extent of anticipated competition, or justification for a noncompetitive procurement. The Contracting Officer may at any time request additional information that must be furnished promptly and prior to award of the subcontract.

(e) When approval of the contractor's procurement system is withheld or withdrawn, the recommendations for correction of those deficiencies which will permit (after correction and assuming that other areas previously found to be satisfactory are not deficient) the granting or reinstatement of approval should be furnished to the contractor in writing. The contractor shall be requested to furnish as soon as possible (normally within two weeks) a time-phased plan for correction of deficiencies. Periodic status reports shall be required to be submitted to the Contracting Officer. The contents of reports of contractor procurement systems reviews, and other information disclosed by the contractor during the review shall be divulged only to those Government personnel having a need to know. (However, the Contracting Officer will furnish three copies of the approved review report (less the recommendations to the Government) to the contractor for information purposes.)

(f) When recommendations are made for improvement of an approved system, the contractor shall be requested to reply as soon as possible (normally within two weeks) as to concurrence or position with respect to the recommendations.

(g) Copies of notifications granting, continuing, withholding, or withdrawing approval of a contractor's procurement system, copies of notifications (or contract modifications) altering the subcontract consent dollar thresholds, copies of recommendations for improvement of an approved system, and information received from the contractor pursuant to (d) and (e) above, shall be transmitted to the Director, Office of Policy, (attn. PR-20).

§9-23.109 Disclosure of approval status of a contractor's procurement system.

Upon request, a prime contractor may be informed that the procurement system of a proposed subcontractor has been approved under Government prime contracts, if such is the case. The prime contractor shall be cautioned that approval status is furnished only as of the date of notification and that the Government does not assume the responsibility to keep the prime contractor advised of any change in the approval status of the proposed subcontractor's procurement system.

§9-23.110 Surveillance of the contractor's approved procurement system.

(a) The Contracting Officer must maintain a sufficient level of surveillance to assure that the contractor continues to effectively manage the procurement program. The Contracting Officer shall develop a surveillance plan and submit it to the Director, Office of Policy, (attn. PR-20) for approval. The surveillance plan shall encompass all phases of the system (pre-award and post-award performance, contract completion and close out) and all operations which impact procurement and subcontracting. Surveillance shall consider all of the elements of the contractor's procurement system including, but not limited to, those items evaluated in the initial review. The surveillance plan must provide for the review and consent to the placement of a representative sample of subcontracts including the largest and most complex subcontracts being issued each year.

(b) Certain subcontractors may require additional surveillance because of the flowdown of policies on cost, schedule, and technical performance.

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PART 9-30 CONTRACT FINANCING

§9-30.000 Scope of part.

This part implements and supplements FPR Part 1-30 for use in the placement and administration of contracts for the procurement of materials and services by or for the account of DOE.

Subpart 9-30.1 Forms of Financing

§9-30.102 Guaranteed loans—description.

The following implements the FPR stating DOE procedure, criteria, and policies:

(a) Procedure. The procedure for obtaining a guaranteed loan is essentially the same as the procedure for obtaining a conventional loan. The contractor or prospective contractor requiring additional funds to perform the contract applies to its bank for a loan or credit of the required amount. The amount may be such that the bank can grant the loan for its own account. However, if for any reason the bank deems it necesssary to require a guarantee, the bank may apply to DOE through the appropriate Federal Reserve Bank for the required guarantee. DOE certification of guaranteed loan applications shall be made only by the Head of the Agency or designee authorized for that purpose.

(b) Criteria. The following criteria apply to the approval of guaranteed loans by DOE:

(1) The materials or services to be furnished by the contractor are necessary to the Government's interest.

(2) Such materials or services cannot practicably be obtained from alternate sources without delaying or impeding the Government's interest, except that no small business concern shall be held ineligible for the issuance of such guarantee by reason of alternative sources of supply.

(3) The contractor has demonstrated its inability to obtain the necessary financing in conventional credit channels without the guarantee.

(4) There is reasonable assurance that the loan can be repaid.

(5) The contractor is competent to perform the contract. Eligibility under subparagraphs (1), (2), and (5) of this paragraph is determined on the basis of findings by the appropriate procuring activity. Eligibility under subparagraphs (3) and (4) of this paragraph is determined by the Controller, based on information contained in the application, the Federal Reserve Bank's report, and information furnished by the procuring activity concerned.

(c) Policies. The following policies governing the exercise of its loan guarantee authority have been established by DOE:

(1) The use of the loan guarantee authority is not restricted to contraots or subcontracts of any particular types or classes. Each case is to be evaluated on its own merits and under the particular circumstances applicable thereto.

(2) The fact that a contract has been awarded as a result of competitive bidding should not, of itself, render the loan ineligible for guarantee by DOE if the contractor is financially responsible and its need for working capital is the result of the impact of the defense program or any other DOE program for which guaranteed loans are authorized.

(3) The guarantee authority should, in general, not be used in connection with loans to contractors required to furnish performance bonds, except in those cases in which the time likely to be required for the surety or DOE to take over in the event of default will result in delays

which cannot be tolerated by the particular program concerned. When performance bonds have been furnished, the surety shall be required to subordinate its rights in favor of the guaranteed loan.

(4) The criterion that the materials or services to be provided cannot readily be procured from alternative sources does not require the finding that the materials or services are absolutely unobtainable elsewhere. The criterion should be so applied as to permit guarantees of loans when, although the materials or services can be obtained elsewhere, such factors as the urgency of supply schedules, technical capacity of the contractor, comparative prices, and time and expense involved in re-issuing the contract, including termination payments, establish that it is to the Government's advantage not to resort to alternative sources merely because the contractor or subcontractor may require a guaranteed loan.

(5) If it is known at the time the contract is to be awarded that the low offeror who is technically qualified and competent to furnish the required materials and services will require a guaranteed loan, the Contracting Officer should obtain appropriate staff advice and in reaching a decision should consider at least the following:

(i) The savings to be realized by awarding the contract to the low offeror;

(ii) The risk to the Government in guaranteeing a loan; and

(iii) The likelihood, if award is made to the second low offeror, of his applying for a guaranteed loan at a later date.

Extreme care should be exercised in rejecting a low bid or proposal simply because the low offeror requires a guaranteed loan.

(6) The amount of the loan should bear reasonable relationship to the value and terms of the contract, the probable investment required to be made by the contractor in payrolls and inventories, etc., the frequency with which contract payments are to be made, and the borrower's current working capital position.

(7) Borrowings for working capital purposes under guaranteed loans shall be limited to the amount necesssary to perform the contracts for which the loan is sought. In order that the contractor will also use its own funds in the performance of the contracts, amounts outstanding under the loan or line of credit shall be limited to an amount not to exceed 90 percent of the borrower's investment in its contracts, regardless of the total amount of the loan or line of credit authorized. The borrower's investment includes all items for which the borrower would be entitled to payment on performance or termination of contracts, but does not include any items for which no work has been done nor expenditures made.

(8) Unless there are exceptional circumstances, the loan should mature not later than 30 days after the estimated date of final payment under the contract.

§9-30.109 Partial payments—description.

Partial payments, as a financing device, may be used in conjunction with other methods of financing, such as guaranteed loans.

Subpart 9-30.2 Basic Policies

§9-30.209 Order of preference.

(a) With respect to cost-reimbursement type procurement geneally, Contracting Officers shall require contractors to employ private financing with or without assignment of contract payments (FPR Subpart 1-30.7). Periodic interim reimbursement on account of incurred cost and payment of fixed fee (if any) will normally be made, reducing the amount of necessary financing for working capital (§9-7.202-4). In some instances, where no other means of adequate financing is available on reasonable terms, DOE may approve (in order of preference) a guaranteed loan or an advance payment for performance of the contract.

(b) Partial payment, as provided for in the standard form of supply contract (FPR 1-16.901-32), should be considered as a form of contractor financing in the second place in the order of preference.

Subpart 9-30.4 Advance Payments

§9-30.400 Scope of subpart.

This subpart does not apply to financing arrangements for contracts with DOE prime operating and on-site service contractors, who are financed through special arrangements.

§9-30.403 Interest.

(a) Interest will be charged on the unliquidated balance of all advance payments at the rate established by the Secretary of the Treasury pursuant to Pub. L. 92-41, 85 Stat. 97, for the Renegotiation Board; however, advance payments may be made without interest:

(1) Pursuant to FPR 1-30.403;

(2) In CPFF contracts for construction or engineering service; or

(3) Where the contract provides that title to the advance funds has been retained by the Government (§9-50.704-18).

§9-30.404 Standards—amounts—need.

The total advance payment shall not exceed 90 percent of the value of the uncompleted portion of the contract and shall not include any portion of the anticipated profit or the fixed fee.

§9-30.406 Responsibility—delegation of authority.

The Head of the Procuring Activity or designee shall have the responsibility and authority for making the findings and determinations referenced in FPR 1-30.406.

Subpart 9-30.5 Progress Payments Based on Costs

§9-30.501 Percentage or stage of completion.

In accordance with FPR 1-30.501, the Head of the Procuring Activity may authorize progress payments based on a percentage or stage of completion.

§9-30.505 Unusual progress payments—standards—procedures.

Requests for unusual progress payments shall be submitted to the Head of the Procuring Activity for approval. The HPA shall forward all requests which are considered favorable, with supporting information, to the Senior Procurement Official, Headquarters, who, with the concurrence of the Controller, will grant final approval.

§9-30.517 Contract financing office clearance.

The prior approval specified here shall be obtained from the Senior Procurement Official, Headquarters, who with the concurrence of the Controller, will grant final approval.

§9-30.528 Consideration for amendments providing for progress payments.

To the extent applicable and appropriate, these provisions may also relate to a partial payments clause. If justified, an amendment for this purpose may be made without consideration, pursuant to FPR Part 1-17 and Part 9-17. When any such amendment is made, the consent of sureties, if any, should be obtained.

Subpart 9-30.7 Assignment of Claims

§9-30.701 General.

FPR 1-30.701 is implemented as follows:

(a) In the case of prime contracts, when it has been determined that the financing of contracts will be facilitated in the interest of DOE program, it is the policy of DOE that such contracts provide, or be amended without consideration (see Assignment of Claims Act of 1940) to provide, that payments to be made to an assignee shall not be subject to reduction or setoff:

(1) For any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contracts; or

(2) For any liability of the assignor on account of:

(i) Renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract;

(ii) Fines;

(iii) Penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with, or for failure to comply with, the terms of the contract); or

(iv) Taxes, social security contributions, or the withholding or nonwithholding of taxes or social security contributions, whether arising from or independently of such contract.

(b) In the case of subcontracts, when loans are made for the purpose of financing performance of subcontracts under DOE prime contracts, financing institutions (or the Government as guarantor in those instances in which such loans are guaranteed) should not be required to incur risks of loss by reason of possible diversion of assigned subcontract proceeds for payment of other claims of the prime contractor against the borrower, otherwise unrelated to the assigned subcontracts. Heads of Procuring Activities shall require the adoption of these policies and practices by DOE prime contractors with respect to DOE subcontract work. Heads of Procuring Activities should inform the Controller of each DOE contractor who is unwilling to adopt policies consistent with this paragraph and the reasons given in support of the contractor's position.

§9-30.703 Contract clause—assignment of claims.

The last two sentences of paragraph (a) of the clause in FPR 1-30.703 shall be deleted in all contracts for transportation services.

§9-30.708 Examination of assignment.

(a) In classified contracts, the assignee should ordinarily be furnished, upon request, with the following information, as applicable, in lieu of a copy of the contract:

(1) Name and address of the DOE prime contractor;

(2) Prime contract number and date;

(3) DOE office and address receiving the material or service;

(4) Subcontract number or purchase order number;

(5) Date of the subcontract or purchase order;

(6) Date on which prime contract, subcontract, or purchase order is to be completed;

(7) Total amount of the subcontract or purchase order;

(8) Dollar amount remaining to be delivered on prime contract, subcontract, or purchase order; and

(9) A statement as to the assignability of the prime contract, subcontract, or purchase order.

(b) It is DOE policy that any assignment of claims shall cover all amounts payable under the contract and not already paid. Partial assignments shall not be permitted unless they are primarily for the benefit of the Government, as stated in FPR 1-30.708(c)(1).

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PART 9–50 OPERATING AND ON-SITE SERVICE CONTRACTS

§9–50.000 Scope of part.

This part sets forth policies and procedures peculiar to contracts for operation of Government-owned or controlled plants, laboratories and other facilities and contracts for furnishing services on those Government-owned or controlled sites. It also sets forth policies and procedures peculiar to procurements placed by those operating and on-site service contractors and other designated contractors.

§9–50.001 Definitions.

(a) For the purposes of this part, and unless otherwise indicated, the following terms have these meanings:

(1) Operating contracts are contracts:

(i) For the management of Government-owned laboratories, production plants, and research facilities located on Government-owned or leased sites, where the programs being conducted are considered of a long-term, continuing nature; or

(ii) For the operation of Government-owned facilities located on contractor-owned or leased sites where the programs being conducted are of a long-term, continuing nature. An example of this category would be those contracts with universities for the operation of Government-owned laboratories and facilities, located on university-owned sites, for the purpose of conducting long-term basic research programs.

(iii) Other contracts performed on Government-owned sites, designated by the Senior Procurement Official, Headquarters, or the Head of the Procuring Activity, to be subject to the provisions of this part. Implementation of §9–50.704–13 through –16 will be subject to the procedures in §9–1.009–2.

(2) On-site service contracts are those cost-reimbursement type contracts for the performance of services of a continuing nature for DOE at Government-owned sites. (These generally would not include support service contracts such as those for management support services, technical evaluation, etc.)

(3) Single purpose contracts for the operation of process developmental units, pilot plants, and demonstration plants where the purpose is to demonstrate the viability of processes toward the goal of commercialization are not considered to be included, unless designated operating contracts in accordance with (iii) above for the purpose of this section.

Subpart 9–50.1 General

§9–50.100 Scope of subpart.

This subpart includes policies and procedures, which apply specifically to operating and on-site service contracts.

§9-50.101 Mandatory use of Federal specifications. (FPR 1-1.305-1)

The paper specification standards published by the Joint Committee on Printing for the purchase of paper to be used on Government-owned printing, binding, and duplicating equipment shall be applied to procurements by operating contractors.

§9-50.102 Contingent fees. (FPR 1-1.5)

The policies and requirements of FPR Subpart 1-1.5 shall be applied to all procurement activities of operating and on-site service contractors.

§9-50.103 List of concerns or individuals debarred, suspended, or declared ineligible. (FPR 1-1.6)

Use of DOE consolidated List of Debarred, Suspended, and Ineligible Contractors published by the Senior Procurement Official, Headquarters, is mandatory on all operating and on-site service contractors.

§9-50.104 Small business and small disadvantaged business concerns. (FPR 1-1.7 and 1-1.13).

(a) The policies and procedures in the following regulations shall be applied to procurement activities of operating and on-site service contractors.

FPR	DOE-PR
1-1.703-1	9-1.706-5
1-1.703-2	9-1.710
1-1.706-5	9-1.710-3
1-1.706-6	
1-1.712-2	

(b) Protests received by contractors regarding small business status or questions concerning small disadvantaged businesses shall be referred to the SBA through the DOE contracting officer.

(c) Procurement of construction between $10,000 and $3 million, including new construction, and repair and alteration of structures, shall be set-aside on a class basis for small business concerns. When, in the judgment of the contractor, a particular procurement falling within these dollar limits is determined to be unsuitable for a small business set-aside, notification to SBA shall be made through the DOE Contracting Officer. Unless SBA appeals the decision (see FPR 1-1.706-2), the contractor shall proceed to process the procurement on an unrestricted basis. Small business set-aside preferences should be considered for construction procurements in excess of $3 million on a case-by-case basis, with such preferential participation of small business to be favored, whenever appropriate.

(d) Initiation of set-asides by contractors shall be made on a unilateral basis.

(e) Procuring activities shall require operating and on-site service contractors to prepare quarterly reports on small business, small disadvantaged business, and contracts placed in labor surplus areas.

(f) To expand participation of small and small disadvantaged business sources by contractors having cost-type contracts, Government-owned plants and laboratories and other on-site service contractors shall publicize proposed actions of $100,000 and above in accordance with FPR 1-1.1003-7.

This procedure will be followed unless approval of the contracting officer to waive the requirements of this provision is obtained.

§9-50.105 Reporting possible antitrust violations (FPR 1-1.9)

The procedures in FPR Subpart 1-1.9 shall be applied to procurements by operating and on-site service contractors.

§9-50.106 Qualified products. (FPR 1-1.11)

(a) Heads of Procuring Activities may authorize use of procedures in FPR Subpart 1-1.11 by operating and on-site service contractors.

(b) Qualified products lists shall be distributed to operating and on-site service contractors authorized to follow QPL procedures.

§9-50.108 Labor Surplus Area Concerns.

(a) The policies and procedures in the following FPR sections shall be applied to the procurement activities of operating and on-site service contractors.

Operating and on-site service contractors are authorized to employ total labor surplus area (LSA) set-asides where there is a reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible LSA concerns so that awards will be made at reasonable prices. The priorities set forth in FPR 1-1.706-1(a) shall be utilized in determining the type of set-aside to be employed.

FPR 1-1.706-1(a) and (e)

1-1.801

1-1.802-1

1-1.802-2(d)

1-1.804-1 (except that the references to §1-1.706-1 and 1-706-2 shall read §1-1.706-1(a) and, 1-1.805-3(e)).

(b) Protests received or questions raised by contractors regarding LSA status shall be handled with the Department of Labor through the DOE Contracting Officer.

(c) LSA set-aside procurements awarded by operating and on-site service contractors shall be reported quarterly on DOE Form PR-330A in accordance with "A Guide to Preparation of DOE Quarterly Procurement and Financial Assistance Reports."

(d) Initiation of set-asides by contractors shall be on a unilateral basis.

OMB CONTROL NO.: 1901—0021, paragraph (c).

§9-50.109 General policy on organizational conflicts of interest.

§9-50.109-1 Scope of subpart.

Subpart 9-1.54 applies to procurements by operating and on-site service contractors.

§9-50.109-2 Architect-engineer/construction services.

Combinations of contracts or subcontracts for architect-engineer and construction services, which may result in self-inspection of construction work, tend to prevent a contractor from rendering unbiased decisions, or create difficulties in segregating costs between contracts, and should be avoided. However, it is recognized that sometimes it is advantageous under carefully circumscribed conditions for DOE to obligate a single firm to perform both architect-engineer and construction management services which may include performance of a segment of the construction work with the contractor's own forces. Unless otherwise authorized by the Senior Procurement Official, Headquarters, the following combinations of contracts or subcontracts *shall not* be awarded to the same firm or to affiliated companies:

(a) In the event that the performance of any portion of the work under either a proposed cost-type or fixed-price contract is to be performed on different projects concurrently with, and in the same general location, then both the cost-type contract and the proposed fixed-price contract shall not be awarded to the same firm or affiliated companies. This restriction applies to contracts for construction services, architect-engineer services, or construction and architect-engineer services.

(b) A fixed-price contract or contracts, for both architect-engineer and construction services on the same construction project, or a cost-type contract for architect-engineer services and a fixed-price contract for construction services on the same construction project. If a firm is to be responsible under such contractual arrangements for both design and construction services, title III architect-engineer services shall be performed by another organization selected by DOE.

(c) A cost-type contract for both architect-engineer and construction services on the same construction project (engineer-constructor contract). If this contractual arrangement is used, the contract shall provide for performance of the title III architect-engineer services by contractor's engineering personnel who are not responsible to the contractor's construction personnel, or the title III services shall be performed by another organization selected by DOE.

§9-50.109-3 Protection and private use of information and data by contractors.

(a) The contractor's obligations for protection of information and data received from DOE and other contractors or subcontractors, and for the contractor's private use of contract data first produced in the performance of the contract, are set forth in subparagraph (b)(2) of each Rights in Technical Data clause in Subpart 9-9.2 This subparagraph provides that the contractor may, subject to patent, security, or other provisions of the contract, use for its private purposes, contract data it first produces in the performance of the contract, provided that the contractor has met its data requirements (e.g., delivery of data in the form of progress or status reports specified to be delivered) as of the date of the private use of such data. It is not necessary that a "Final Report" be submitted in order to privately use data if all required progress and interim reports and other technical data then due have been delivered. Paragraph (b)(2) further provides that technical or other data received by the contractor in the performance of the contract must be held in confidence by the contractor in accordance with restrictions accompanying the data.

(b) Information which is reported to DOE by DOE contractors will normally be disseminated by DOE to others.

(c) Employees of contractors operating DOE facilities may not be used to assist in the preparation of a proposal or bid for the performance of private commercial services similar or related to those being performed under the DOE contract unless such employee has been separated, with DOE approval, from performance of work under the DOE contract for such period as the Head of the Procuring Activity or designee shall direct consistent with the purpose of this section.

(d) Contractors operating DOE facilities, and performing services, as a part of their contract work for other Government agencies or private organizations should not be permitted to utilize information which is furnished by such customers for their own private activities unless it is generally available to others, or unless the customer authorizes such use.

Subpart 9-50.2 Mistakes in Subcontracting

§9-50.201 Procedures for handling mistakes under operating and on-site service service contractor procurement.

(a) Heads of Procuring Activities may authorize the withdrawal of bids or the correction of mistakes in bids submitted to, and contracts awarded by contractors in accordance with this section.

(1) Contractors may permit the withdrawal of bids upon a showing of clear and convincing evidence of the alleged mistake.

(2) Contractors may correct obvious clerical errors in bids disclosed prior to award, regardless of amount.

(3) Except as provided in paragraph (4) of this section, contractors may correct other mistakes in bids and contracts as provided in this section.

(4) The Head of the Procuring Activity's approval shall be required for:

(i) Any corrections of mistakes which would cause the bid or contract price (A) to exceed that of the second low bid, or (B) to displace one or more lower acceptable bids;

(ii) Any corrections of mistakes in bids, other than obvious clerical errors, in procurement actions which require DOE approval;

(iii) Any correction of mistakes in contracts disclosed after award which exceed $10,000; and

(iv) Any rescission of a contract.

(b) Corrections of mistakes are authorized under paragraph (a)(3) and (4) of this section when:

(1) There is clear and convincing evidence to support both the assertion of a mistake and the amount thereof;

(2) The mistake was made in good faith;

(3) The mistake is of such a nature that correction thereof is justified by considerations of fair dealing; and

(4) The mistake is of the type that would be corrected under the contractor's private procurement practices, or with respect to mistakes in bids in excess of $10,000, or which require approval of the Head of the Procuring Activity, a determination is made that relief would be granted under applicable Federal law.

(c) The authority of this section may not be used to make a bid responsive.

(d) Where rescission is an appropriate remedy, the Head of the Procuring Activity may authorize a modification in a specific amount, or approve revisions in other terms and conditions, in lieu of rescission.

(e) Where a contract is executed or work is continued after assertion of a mistake, the alleged mistake may be considered on its merits as of the time it was asserted, provided the contract was executed or the work continued pursuant to an understanding that such action did not constitute a waiver of any rights.

(f) Corrections of mistakes or other remedial actions taken pursuant to this section shall be documented by a written statement setting forth the circumstances and basis for such action and shall be made a part of the procurement file.

(g) When correction of mistakes or other relief cannot be granted under the criteria of this section, the Head of the Procuring Activity may deny the request or forward the file to the Senior Procurement Official, Headquarters, with his recommendation for action.

Subpart 9-50.3 Procurement

§9-50.300 Scope of subpart.

This subpart contains policies and procedures for operating or on-site service contracts.

§9-50.301 Types of contracts.

The contract type used for operating or on-site service contract effort may be of any type which will promote the best interests of the Government.

§9-50.302 Subcontracting policies and procedures.

§9-50.302-1 General.

Procurement activities of operating and on-site service contractors are governed by contract provisions. Federal Procurement Regulations generally are not directly applicable. There are, however, requirements of certain Federal laws, executive orders, and regulations, including Federal Procurement Regulations, which pertain to procurements by these contractors. These requirements, together with implementing DOE procurement Regulations which apply to contractor procurement, are identified in this section.

§9-50.302-2 Responsibility of Contracting Officers.

Contracting Officers are responsible for assuring that procurement by operating and on-site service contractors conforms to contract requirements and provides effective and timely support to agency programs. In carrying out this responsibility, Contracting Officers: (1) assure that contracts include those provisions required by law or regulations, and such other provisions as are appropriate to implement DOE policies and requirements; (2) review operating and on-site service contractor procurement systems (including policies) as required by Part 9-23 and in accordance with the provisions of their contracts; (3) review individual procurement actions of certain types or above stated dollar levels; and (4) make periodic appraisals of the contractor's management of the procurement function in accordance with criteria established by the Senior Procurement Official, Headquarters.

§9-50.302-3 Policies.

The following policies apply to operating and on-site service contractor procurement. Within these policies it is expected that procurement systems and methods will vary according to the types and kinds of procurement to be made, the needs of the particular programs, and the experience, methods, and practices of the particular contractor.

(a) Procurement systems and methods used for DOE contract work should be well defined, consistently applied, and follow good business practices appropriate for the requirement and amount of procurement involved.

(b) Procurement should be effected in the manner most advantageous to the Government—price, quality, and other factors considered. In order to assure this objective and the award of business on an impartial basis, procurement (from other than Government sources) shall be effected by methods calculated to assure such full and free competition as is consistent with securing the required supplies and services. Generally, procurement actions are carried out through one of the following methods:

(1) Competitive offers or quotations and award. The competitive offer or quotation and award method of procurement, which normally assures the greatest degree of full and free competition, generally involves the following basic steps and objectives:

(i) Preparation of a solicitation document setting forth contract terms and conditions and describing the requirement clearly, accurately, and completely, avoiding unnecessarily restrictive specifications or requirements.

(ii) Publicizing such solicitations by distribution to a reasonable number of prospective offerors and by such other means as may be appropriate, in sufficient time to permit the preparation and submission of offers before the time set for receipt of offers. This time shall be uniform for all.

(iii) Handling solicitations in a manner which provides fair and equal treatment to all prospective contractors.

(iv) Making an award to the prospective contractor whose offer, in response to the solicitation, will be most advantageous to the Government, price and other factors considered. However, if upon evaluation, it is determined to be in the best interests of the Government to enter into negotiations with prospective contractors before award, such negotations should be conducted in accordance with (2) below with respect to according fair and equal treatment to prospective contractors.

(2) Negotiation. Procurement by this method normally should be conducted by competitive negotiations through the solicitation and evaluation of proposals, from an adequate number of qualified sources to assure effective competition, consistent with securing the required supplies or services. Negotiated procurement involves advance planning, description of procurement and delivery requirements, and consideration of the effect these requirements may have on prices and competition. Requests for proposals should describe the property or services required as completely as possible; allow sufficient time for the submission of proposals; and establish a closing date for receipt of proposals. Proposals should be handled in a manner which provides fair and equal treatment to all prospective offerors. Selection of offerors for negotiation and award shall be consistent with FPR 1-3.805 and §9-3.805.

(c) Price or cost analysis shall be performed in accordance with the requirements of FPR 1-3.807 and 9-3.807 and FPR 1-3.809 and 9-3.809. Profit and fee objectives shall be consistent with guidance in § 9-3.808. Allowable cost shall be determined in accordance with the cost principles of Part 9-15 appropriate for the type of organization to which the subcontract is awarded.

(d) Supplies and services normally should be procured through the use of specifications. standards, or purchase descriptions which clearly and accurately describe the supplies or services to be procured. If such specifications, standards, or purchase decriptions are not available and it is impractical and uneconomical to prepare them, "brand name or equal" descriptions may be used, provided the particular physical functions or other characteristics of the brand name item which are deemed essential are clearly identified and described.

(e) The need for access authorizations to classified information shall not be a limiting factor in obtaining competition except where time will not permit securing additional access authorizations.

(f) Awards shall be made only to responsible responsive prospective contractors. Awards shall not be made to firms or individuals on the DOE List of Disqualified Bidders and Ineligible Contractors, unless it is determined that it is in the best interests of the Government to do so. Such determination shall be forwarded to the Senior Procurement Official, Headquarters, for concurrence prior to issuance of the contract.

(g) Selection of the type of contract to be used should be based on consideration of the nature of the supplies and services required and other circumstances surrounding the procurement. The cost-plus-a-percentage-of-cost system of contracting shall not be used in any event.

(h) Small purchases (purchases not in excess of $10,000) should be made by methods designed to (1) obtain fair and reasonable prices, (2) reduce administrative costs of making such purchases to the minimum required to establish the propriety of placing the order at the price paid with the supplier concerned, and (3) improve opportunities for small and minority business concerns within the local trade area to obtain a fair proportion of purchases.

§9-50.302-4 Procurement from contractor-controlled sources.

(a) When an operating or on-site service contractor maintains a separate procurement function for performance of work in DOE facilities on DOE sites, procurement from contractor-controlled sources (any division, subsidiary, or affiliate of the contractor under a common control) may be treated in the same manner as procurement from other sources provided the procurement is made:

(1) Under the same terms and conditions as would apply if the purchase were from a third party;

(2) In accordance with policies and procedures particularly designed to permit fair and open competition which have been approved by the Contracting Officer; and

(3) In a manner which results in legally enforceable terms and conditions.

When any of the conditions above cannot be met, procurements involving contractor-controlled sources should be made with the prior approval of, or in rare instances, directly by the DOE.

(b) Subcontracts for performance of contract work itself (as distinguished from procurement of supplies and services needed in connection with the performance of work) require DOE authorization which may involve an adjustment of the contractor's fixed fee. If the contractor seeks authorization to have some part of the contract work performed by a contractor-controlled source, and the contractor's performance of that work was a factor in the negotiated fixed fee, DOE approval would normally require (1) that the contractor-controlled source perform such work on a basis without profit, or (2) an equitable downward adjustment to the contractor's (i.e., the contracting component's) fixed fee.

§9-50.302-5 Review and approval.

(a) Heads of Procuring Activities shall require contractors to obtain the approval of the Contracting Officer before entering into any subcontracts or purchase orders within the following categories:

(1) Specified contract types. Approval shall be required before entering into cost reimbursement, labor hour, and time and materials type subcontracts in excess of $500.

(2) Specified dollar amounts. Approval shall be required prior to entering into subcontracts or purchase orders above specified dollar amounts. Dollar limits will be established at the discretion of Heads of Procuring Activities, taking into consideration such factors as the nature of work under each contract, the estimated cost of work under the contract, the contractor's procurement organization, other controls exercised over the contractor's procurement operations, and policies with respect to approvals established by Headquarters or field offices. Except as provided in paragraph (a)(5)(i) and (a)(5)(ii) of this section subcontracts or purchase orders in excess of the following amounts shall require prior DOE approval:

(i) Construction and A-E, $10,000;

(ii) Off-site R&D, $10,000; and

(iii) All others, $25,000.

(3) Contracts entered into under section 41. Prior approval shall be required for the subcontracting of any work a contractor is obligated to perform under a contract entered into under section 41 of the Atomic Energy Act of 1954, as amended.

(4) Specified materials, equipment, or services. Heads of Procuring Activities shall take such action as may be required to insure compliance with the procedure for purchases from contractor-controlled sources or the procurement of specific items, or classes of items which by the terms of the contract may require DOE approval.

(5) Exceptions.

(i) In the event application of any of the dollar amount limitations established in subparagraph (1) and (2) above would impair the DOE program of the field office or would be impracticable under the circumstances, or such higher levels would be in the Government's best interest, the Head of a Procuring Activity may, upon making such determination, establish a dollar amount up to $100,000 subject to advance notification limitations set forth in §9-3.901(c). Requests to establish dollar levels in excess of $100,000 shall be submitted to the Director, Office of Policy (Attn PR-20) for approval and contain the applicable information required in .-23.107(b). Advance notification required in §9-23.108(c) shall be applicable to all such higher levels established.

(ii) When a review has been made of the Contractor's procurement system in accordance with Subpart 9-23 and the Contractor's procurement system has been approved, the subcontract dollar thresholds in paragraphs (1) and (2) above may be raised up to the amount of the delegated authority of the Head of the Procuring Activity.

(6) Emergency approvals.

(i) Heads of Procuring Activities may, up to the limits of their delegated authority, give oral approval (or approval by telephone or teletype) to any subcontract or purchase order requiring DOE approval in instances of compelling or unusual urgency, such as circumstances under which an DOE program would be seriously hampered or delayed if supplies or services are not obtained by a certain date and time does not permit the obtaining of formal approval. Such emergency approvals shall be confirmed in writing.

(ii) Operating and other on-site contractors shall be required to justify procurements in writing, setting forth the information and data used in determining that the procurements are in the best interests of the Government. The scope and detail of this documentation shall be consistent with the nature, dollar value, and complexity of the procurement.

(A) Contracting Officers shall assure that operating and other on-site contractors establish and maintain procurement files which contain those documents essential to present an accurate and adequate record of the transaction.

(B) Field offices will establish files for the review and approval of contractor procurement actions, including among other necessary documentation, an appraisal of the proposed action and a copy of suggestions, deficiencies, or improvements forwarded to the contractor.

OMB CONTROL NO.: 1901—0021, paragraph (a)(6)(ii).

§9-50.303 Operating and on-site service contracts.

(a) The criteria herein are only available to extension of operating and on-site service contracts for the performance of functions transferred from the Atomic Energy Commission (AEC). Extensions of other operating and on-site service contracts must be justified on the basis of generally applicable exceptions to competition or as a result of competition.

(b) Competition for existing operating and on-site service contracts will be sought whenever it appears likely that the Government's position may be meaningfully improved in terms of cost or performance, unless it is determined that to change a contractor would be contrary to the best interest of the Government. Except in those cases where the contract specifically permits the Government to bring in a replacement contractor, normally it would not be practical to compete an operating contract which includes major Government-owned facilities on contractor-owned or leased sites. In such cases, the alternatives would be to extend the contract or to allow the contract to expire and, if the work is to be continued, place all or some part of the work with another contractor at a different site.

(c) The following factors, as a minimum, should be considered in determining whether an existing operating or on-site service contract should be competed.

(1) Overall performance of an incumbent contractor including specific consideration of the contractor's technical, administrative, including environmental, safety, health and energy conservation program considerations, and cost performance.

(2) Potential impact of change of contractors on programmatic activities.

(3) The likelihood that qualified industrial firms or other organizations will compete for the contract.

§9-50.304 Field recommendations to extend or compete operating contracts and on-site service contracts.

(a) The provisions of §9-50.303(a) apply.

(b) The decision to extend or compete operating contracts or on-site service contracts in conformity with §9-50.303 above, requires advance Headquarters' approval when the proposed action is in excess of $5 million. The request to extend or compete operating contracts or on-site service contracts, when the action does not exceed $5 million, must comply with the policy stated in §9-50.303 and be supported in writing as thoroughly as if it were to be submitted to Headquarters.

(c) If an action requires advance Headquarters approval, the Head of the Procuring Activity will submit a memorandum that recommends either extending or not extending an operating or on-site service contract. This summary of recommended action, together with attachments supporting it, will be submitted at least 18 months prior to expiration of the contract. The attachments shall include the following information:

(1) A full and complete justification of the recommendation that is made, i.e., either to obtain competition or to extend the contract without obtaining competition. This justification must address the policy stated in §9-50.303. It shall also discuss the availability of other qualified firms or organizations, if any, to compete for the contract.

(2) A statement of the present contractor's overall performance since award of the contract, or if previously extended, since Headquarters' last authorized extension of the contract. This should be supported by a copy or detailed summary of the most recent overall DOE management appraisal of the contractor's performance.

(i) The technical appraisal shall include data which indicates the contractor's success or failure in meeting established program goals and objectives during the appraisal period. It is recognized that in some cases, the contracting office will not have the technical staffing necessary to perform an appraisal of the scientific and technical work under the contracts they are administering, as in the case with the contracts for the operation of DOE's national laboratories. When this is the situation, the contracting office shall obtain the necessary technical appraisal information from the appropriate Headquarters' program division(s) for incorporation into the overall management appraisal.

(ii) The cost appraisal shall include data that indicates the contractor's success or failure in controlling both direct and indirect costs.

(iii) Where the contract is a cost-plus-award-fee (CPAF) or similar arrangement, include a discussion of award fee experience since the date that the contract has been on a CPAF basis, showing the base fee, award fee pool, award fee appraisals, and award fee earned.

(iv) A separate appraisal shall be made of the contractor's performance in assuring consideration of environmental, safety, health and energy conservation in the operation of the facility and development of products.

(3) The justification for use of the contract type contemplated, including discussion of consideration given to use of the CPAF type contract.

(4) Summary description of scope of work and brief listing of some of the important projects which have been performed under this contract. A list of any important projects planned for assignment in the future should be included.

(5) The cost level and fee or management allowance over the past contract period and expected cost level in the future.

(6) While a copy of the proposed contract document should not be submitted with the recommendation, Headquarters should be advised of the following:

(i) Any special or unique features (with brief supporting rationale) in the existing contract expected to be continued in either the extension of the existing contract or in the replacement contract. This shall include any provisions which deviate from standard clauses.

(ii) An outline of the principal issues to be negotiated if the contract is extended, with arguments pro and con, with a recommended position. This should include the identification of any anticipated problem areas for which Headquarters guidance is needed and should also include a justification for any provisions which deviate from standard clauses and continued use of deviations granted in the past.

(d) If Headquarters makes the decision to extend the existing contract without obtaining competition, the HPA or designee will be authorized to negotiate an extension to the contract. The HPA or designee shall submit the negotiated contract to Headquarters for the approval of the Senior Procurement Official, Headquarters, prior to execution, only if the action exceeds the HPA's delegated dollar authority. The proposed contract document shall be accompanied by the following:

(1) A complete justification of the negotiated contract in accordance with the relevant provisions of § §9-51.103-1 and §9-51.602-2;

(2) A summary of the major provisions of the proposed contract with particular attention to indemnity, patents, and conduct of work (including provisions concerning control over work and termination). Any deviations from current FPR or DOE procurement policies or standard contract clauses should be identified with the reasons therefore;

(3) A listing of any significant changes from the existing contract.

Subpart 9-50.4 Special Types and Methods of Procurement

§9-50.400 Scope of subpart.

This subpart implements and supplements the policies and procedures set forth in FPR Part 1-4 and DOE-PR Part 9-4, as these relate to operating contractors.

§9-50.401 Public utilities.

The requirements of §9-4.4 and FPR 1-4.4 shall be applied to contractors that manage and operate Government-owned facilities, when such contractors are authorized pursuant to §9-4.406-1 to procure utility services.

§9-50.402 Nuclear material transfers.

(a) Operating contractors and on-site service contractors, in preparing contracts or other agreements in which monetary payments or credits depend on the quantity and quality of nuclear material, shall assure that each such contract or agreement contains a:

(1) Description of the material to be transferred;

(2) Provision specifying the method by which the quantities are to be measured and reported;

(3) Provision specifying the procedures to be used in resolving any differences arising as a result of such measurements;

(4) Provision providing for the use of an umpire to settle unresolved differences in the analytical samples; and

(5) Provision specifying in detail which party shall bear the costs of resolving a difference and what constitutes such costs.

(b) The provisions providing for resolution of measurement differences must be such that resolution is always accomplished, while at the same time minimizing any advantage one party may have over the other.

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Subpart 9-50.5 Special and Directed Sources of Supply

§9-50.500 Scope of subpart.

Provisions of this subpart implement and supplement FPR Part 1-5 procurements by operating and on-site service contractors.

§9-50.501 Excess personal property.

Policies, procedures, and requirements of FPR Subpart 1-5.3 and DOE Property Management Regulation (PMR) 109-43 shall be applied.

§9-50.502 Interagency motor pool vehicles and related services.

Policies, procedures, and requirements of FPR Subpart 1-5.5 and PMR 109-39 shall be applied in authorizing contractors and subcontractors to use interagency motor pool vehicles and related services.

§9-50.503 Use of GSA supply sources. (FPR 1-5.9)

(a) Contractors should meet their requirements from GSA sources, if these sources are made available to them and if it is economically advantageous or otherwise in the best interest of the Government.

(b) Heads of Procuring Activities may authorize contractors' subcontractors with cost-reimbursement type subcontracts, where all higher-tier subcontracts are of cost-reimbursement types, to use General Services Administration (GSA) supply sources (i.e., items available through Federal Supply Schedule contracts and other GSA contracts and from GSA Stores Stock) in accordance with the requirements and procedures in FPR Subpart 1-5.9 and DOE-PMR 109-26.2.

(c) Direct procurement by DOE, rather than by a contractor, shall be required where deemed necessary by the Heads of Procuring Activities in order to carry out special requirements of appropriation acts or other applicable laws relating to particular items.

(d) Contracting Officers, when reviewing the procurement systems and methods of those contractors that have been authorized to use GSA sources of supply, shall assure that provision is made for documenting the justification of procurements from commercial sources of items available from GSA sources of supply. The Senior Procurement Official, Headquarters, shall be informed of instances in which GSA sources of supply are not used because of the quality of the item available from GSA.

§9-50.504 Use of excess materials from General Services Administration inventories.

(a) It is the policy to comply with the provisions of the Federal Property Management Regulations Part 101-14, National Stockpile, as supplemented from time to time by FPMR Bulletins.

(b) Contracting Officers shall require their contractors which use strategic and critical materials, to fulfill their requirements through the use of the excess strategic and critical materials in the GSA inventories.

(c) General Services Adminstration (ANSD), Washington, DC, 20405, should be contacted directly for any detailed information concerning specifications, prices, and method of placing the order.

§9-50.505 Use of Government sources of supply.

(a) Contractors should meet their requirements from Government sources of supply, if these sources are made available to them and if it is economically advantageous or otherwise in the best interest of the Government.

(b) Heads of Procuring Activities may authorize contractors to acquire materials and services directly from such Government sources of supply in accordance with the requirements of this subpart or the consent of agencies involved.

(c) Materials, supplies, and equipment procured from Government sources of supply under the procedures described herein must be used exclusively in connection with Government work, except as otherwise authorized by Heads of Procuring Activities.

(d) Many supply facilities and contracts of the Department of Defense are made available to DOE and its operating and other on-site contractors.

(1) Field offices will be notified by the Senior Procurement Official, Headquarters or designee, when such contracts and facilities are made available. Inquiries in connection with these sources may be directed to the Senior Procurement Official, Headquarters. Requisitions or purchase orders shall be submitted directly to these sources, unless otherwise specified.

(2) Contractors' requisitions submitted to Defense Logistic Centers shall include the following statement: "The consignee of the supplies and materials requisitioned herein is acting in behalf of and as agent for DOE with respect to the expenditure of Government funds." Orders submitted directly to Department of Defense contractors shall be accompanied by an authorization substantially similar to that in FPR 1-5.903-2.

§9-50.506 Procurement of special items. (§9-5.52)

§9-50.506-1 Motor vehicles.

Operating and on-site service contractors will follow §9-5.5201.

§9-50.506-2 Typewriters.

(a) This section covers the purchase, for use by either DOE or operating and on-site contractors, of typewriters, whether to fill initial requirements or for replacement purposes, and typewriter repair and reconditioning services.

(b) "Typewriters" are manually and electrically operated machines having standard or special keyboards, designed to produce printed characters by impression of type upon paper through the medium of an inked ribbon. The term includes the varityper, hektowriter, proportional spacer, flexowriter, justowriter, and portable teletypewriting machines.

(c) Typewriters shall be purchased for replacement purposes in accordance with FPMR 101-25.403 and DOE-PMR 109-25.403.

(d) Purchase orders for typewriters, whether for replacement or otherwise, and for rental, repair or maintenance of typewriters, shall be prepared and transmitted to the appropriate Federal Supply Schedule contractor. When contractors are authorized to make purchases under Federal Supply Schedules, Heads of Procuring Activities may authorize them to use their own purchase order forms properly identified, according to FPR Subpart 1-5.9.

(e) Electric typewriters for use by contractors may be purchased only when DOE standards are met.

(f) The procurement of typewriters that will be used for printing shall comply with the approval requirements of the Joint Committee on Printing.

§9-50.506-3 Printing equipment and printing services.

The Joint Committee on Printing, Congress of the United States, periodically publishes "Government Printing and Binding Regulations." These regulations govern the acquisition, use, and disposal of printing equipment and the procurement of printing services with appropriated funds. Acquisitions (lease or purchase) of printing, duplicating, and copying equipment, and transfers or disposal of this equipment by DOE operating contractors which produce or procure printing, duplicating, copying, and related services, require prior approval in accordance with DOE Order 1340. Requests for approval shall be submitted in writing to the Senior Official in Charge of Administrative Services, Headquarters.

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§9-50.506-4 Alcohol. (§9-5.5204)

(a) To the fullest practicable extent, alcohol for use by operating and other on-site contractors will be procured on a tax-free basis.

(b) Where an operating or other on-site contractor will be the user, the application form (§9-5.5204-5) shall indicate that shipment shall be made to DOE, in care of the contractor.

(c) A signed copy of the permit to procure specially denatured alcohol and ethyl alcohol shall accompany the original purchase order issued to the plant or warehouse, where it will be retained. Subsequent orders shall refer to the permit on file in the plant or warehouse. Order Form DOE-103 shall be issued by DOE for operating and other on-site contractors' requirements, when the contractors have not been authorized to place orders.

(d) Heads of Procuring Activities may authorize operating and other on-site contractors to apply for permits to purchase specially denatured alcohol, subject to restrictions of the Bureau of Alcohol, Tobacco and Firearms as to end use. In order to qualify, these contractors must be bonded, must submit reports, and are subject to inspection by the Bureau of Alcohol, Tobacco and Firearms.

(e) Under Bureau of Alcohol, Tobacco and Firearms regulations, these contractors performing scientific or research work or operating hospitals are permitted to procure alcohol tax-free. These regulations require bonding under certain circumstances, submission of reports, and inspection by the Bureau of Alcohol, Tobacco and Firearms.

(f) Purchases may be made by DOE or the contractor, whichever is in the best interest of the Government, considering administrative costs and other pertinent factors that may be applicable. For recurring requirements, one factor to consider is that bonding, reporting, and inspection requirements do not apply to purchases by DOE.

§9-50.506-5 Helium. (§9-5.5205)

Operating and other on-site contractors may purchase helium, to the extent supplies are readily available, from the Department of Interior (Bureau of Mines).

§9-50.506-6 Miscellaneous items. (§9-5.5206)

(a) All acquisitions of aircraft, except for temporary (30 days or less) rentals or loans, shall be approved in advance by the Senior Procurement Official, Headquarters.

(b) Requirements for Government forms shall be obtained through DOE.

(c) Steel filing cabinets and security cabinets will not be procured unless approved by the Head of the Procuring Activity.

(d) Federal agencies may procure, without further reference to or clearance from the Department of the Army, all arms and ammunition of types which are not peculiar to the military services, and which are readily procurable in the civilian market. Contractors shall follow regular procurement procedures when making such purchases. Arms and ammunitions peculiar to the military services shall be procured in accordance with §9-5.5206-11.

(e) Gold (See §9-5.5206-13).

(f) Orders for calibration services may be placed in accordance with §9-5.5206-16.

(g) Procurement of devices primarily designed to be used surreptitiously to overhear or record conversations is prohibited.

(h) Supplies of assault masks and cannisters may be requisitioned from Oak Ridge and Richland. (§9-5.5206-19)

(i) Masking devices are assembled at the DOE plant at Paducah, KY, and may be requisitioned at cost. (§9-5.5206-21)

(j) Orders for heavy water shall be placed with the Senior Program Official.

(k) Lithium is available at no cost other than normal packing, handling, and shipping charges. The excess quantities at Oak Ridge are to be considered as the first source of supply, prior to procurement of lithium or lithium compounds from any other source.

(l) Prior to purchase of platinum on the open market, contractors shall clear the availability of DOE platinum with the Chicago Operations Office.

(m) Specific items to be procured in accordance with the provisions of the Federal Property Management Regulations:

	Item	FPMR
(1)	Appliances	101-26.503 (§9-5.5206-7)
(2)	New electric water coolers	101-26.502 (§9-5.5206-6)
(3)	Fuels and packaged petroleum products	101-26.602 (§9-5.5206-10)
(4)	Furniture	101-26.505 (§9-5.5206-12)
(5)	Products made in Federal penal and correctional institutions	101-26.702
(6)	Products and services of the blind and other severely handicapped	101-26.701
(7)	Materials handling equipment	101-26.405 (§9-5.5206-15)
(8)	Coal	101-26.202 (§9-5.5206-18)
(9)	EDP tape	101-26.508 (§9-5.5206-20)

§9-50.507 Purchase or lease determinations.

The guidelines in FPMR 101-25.5 for making purchase or lease determinations shall be applied to the acquisition of all types of equipment. These guidelines shall be used in making lease-versus-purchase determinations at time of original acquisition, when lease renewals are being considered, or at other times as circumstances warrant.

Subpart 9-50.6 Buy American Act - Supply and Service Contracts

§9-50.600 Scope of subpart.

The requirements of FPR Subpart 1-6.1 and Subpart 9-6.1 shall be applied to operating and on-site contracts and procurements made under these contracts.

§9-50.601 Exceptions.

§9-50.601-1 Nonavailability in the United States.

The Buy American Act does not apply to those articles listed in § 9-6.105, or as determined not to be available in sufficient quantities, in accordance with § 9-50.601-2.

§ 9-50.601-2 Determinations of Nonavailability.

(a) Determinations of nonavailability under FPR 1-6.103-2 may be made by the Contracting Officer responsible for the administration of the contract.

(b) When a review has been made of the contractor's procurement system in accordance with Subpart 9-23.1 and the contractor's procurement system has been approved, the Head of the Procuring Activity may authorize the contractor to make determinations of nonavailability for individual items under individual procurement actions. Each authorization shall be in writing and shall specify a dollar value limit for the aggregate of domestically unavailable items in individual procurement actions. Each authorization shall also specify the effective date, the activity, the division or facility authorized to make the determinations, the period the authorization covers, the extent of applicability, and any special conditions or requirements. Authorizations shall be no broader than other authorizations made pursuant to § 9-23.108. Authorizations for dollar value limits in excess of $25,000 shall require the prior concurrence of the Senior Procurement Official, Headquarters.

§9-50.602 Balance of payments program.

The policies and procedures of FPR Subpart 1-6.8 shall be applied to procurements by operating and other on-site contractors for use outside the United States.

Subpart 9-50.7 Contract Clauses for Operating and On-site Service Contracts

§9-50.700 Scope of subpart.

This subpart sets forth the contract clauses for use in operating and on-site service contracts.

§9-50.701 General policy.

The clauses set forth in appropriate subparts of FPR Part 1-7 and Part §9-7 generally apply to operating and on-site service contracts. The clauses in this subpart are to be used in addition to or in place of the FPR or the DOE-PR counterpart contract clauses where appropriate. Further modifications and notes to certain FPR clauses are also prescribed, in addition to those set forth in Part 9-7.

§9-50.702 Deviations.

Deviations from the standard contract clauses and modifications to FPR clauses set forth herein, as well as from the standard contract clauses prescribed in FPR Part 1-7 and Part 9-7, shall be made only in accordance with the deviation procedures of §9-1.009. Minor changes in wording which may become necessary in negotiations are not considered deviations, provided Counsel determines that the change is not prohibited by statute, executive order, or administrative regulation and does not alter the meaning, intent or basic principles expressed in these clauses.

§9-50.703 Modifications and notes to FPR clauses, in addition to those set forth in Part 9-7.

§9-50.703-1 Covenant against contingent fees.

See FPR 1-1.503.

NOTE: Modify this article by adding before the initial paragraph thereof "(a) Warranty - Termination or deduction for breach" — and adding the following paragraph:

> "(b) Subcontracts and purchase orders. Unless otherwise authorized by the Contracting Officer in writing, the contractor shall cause provisions similar to the foregoing to be inserted in all subcontracts and purchase orders entered into under this contract."

§9-50.703-2 (Reserved).

§9-50.703-3 (Reserved).

§9-50.703-4 Examination of records by Comptroller General.

See FPR 1-7.103-3, modified as set forth in §9-7.103-3. Also, see Note A below for required addition to the clause set forth in FPR 1-7.103-3.

NOTE A: The following paragraph (e) should be added, whenever possible in prime contracts, both for the protection of the Government and the contractor. It may be omitted only with the approval of the Senior Procurement Official, Headquarters, upon a specific determination, based on consultation with the Office of the Controller and the Office of the General Counsel, that nothing in the contract purports to preclude an audit by the General Accounting Office of any transaction thereunder.

> (e) Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

NOTE B: Contracts exempt from audit rider. The Examination of Records clause is not required in contracts with any foreign government or agency thereof or in contracts with foreign producers.

NOTE C: Substitute the words "unless the DOE authorizes their prior disposition" for the words "or such lesser time specified in either Appendix M of the Defense Acquisition Regulations or the Federal Procurement Regulations 1-20, as appropriate" in paragraphs (b) and (c).

§9-50.703-5 Buy American Act.

(a) See FPR 1-6.104-5.

(b) Substitute "used" for "delivered" in paragraph (b), and

(c) Insert a parenthetical, "(by the contractor, subcontractors, materialmen, and suppliers) ," after the word "contract" in the second line of (b).

§9-50.704 Clauses to be used in addition to or in place of the contract clauses set forth in FPR Part 1-7 and DOE-PR Part 9-7, where appropriate.

§9-50.704-1 Security.

(a) Contractor's duty to safeguard Restricted Data, Formerly Restricted Data, and other classified information. The contractor shall, in accordance with the Department of Energy's security regulations and requirements, be responsible for safeguarding Restricted Data, Formerly Restricted Data, and other classified information and protecting against sabotage, espionage, loss and theft, the classified documents and material in the contractor's possession in connection with the performance of work under this contract. Except as otherwise expressly provided in this contract, the contractor shall, upon completion or termination of this contract, transmit to DOE any classified matter in the possession of the contractor or any person under the contractor's control in connection with performance of this contract. If retention by the contractor of any classified matter is required after the completion or termination of the contract and such retention is approved by the Contracting Officer, the contractor will complete a certificate of possession to be furnished to DOE, specifying the classified matter to be retained. The certification shall identify the items and types or categories of matter retained, the conditions governing the retention of the matter, and the period of retention, if known. If the retention is approved by the Contracting Officer, the security provisions of the contract will continue to be applicable to the matter retained.

(b) Regulations. The contractor agrees to conform to all security regulations and requirements of the DOE.

(c) Definition of Restricted Data. The term "Restricted Data," as used in this clause, means all data concerning, (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to Section 142 of the Atomic Energy Act of 1954, as amended.

(d) Definition of formerly Restricted Data. The term "Formerly Restricted Data," as used in this clause, means all data removed from the Restricted Data category under Section 142 d. of the Atomic Energy Act of 1954, as amended.

(e) Security clearance of personnel. The contractor shall not permit any individual to have access to Restricted Data, Formerly Restricted Data, or other classified information, except in accordance with the Atomic Energy Act of 1954, as amended, and the DOE's regulations or requirements applicable to the particular type or category of classified information to which access is required.

(f) Criminal liability. It is understood that disclosure of Restricted Data, Formerly Restricted Data, or other classified information relating to the work or services ordered hereunder to any person not entitled to receive it, or failure to safeguard any Restricted Data, Formerly Restricted Data, or any other classified matter that may come to the contractor or any person under the contractor's control in connection with work under this contract, may subject the contractor, its agents, employees, or subcontractors to criminal liability under the laws of the United States. (See the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq.; 18 U.S.C. 793 and 794; and Executive Order 11652.)

(g) Subcontracts and purchase orders. Except as otherwise authorized in writing by the Contracting Officer, the contractor shall insert provisions similar to the foregoing in all subcontracts and purchase orders under this contract.

NOTE: This clause is required in contracts entered into under Sections 31 or 41 of the Atomic Energy Act of 1954, as amended, and in other contracts, subcontracts, and purchase orders the performance of which involves or is likely to involve Restricted Data, Formerly Restricted Data, or other classified information.

OMB Control No.: 1901—0021, paragraph (a).

§9-50.704-2 Safety and health.

(a) The clause set forth herein shall be included in all contracts and subcontracts for, and be made applicable to, work to be performed at a government-owned or leased facility where DOE has elected to assert its statutory authority to establish and enforce occupational safety and health standards applicable to the working conditions of contractor and subcontractor employees, and to the protection of the public health and safety.

SAFETY AND HEALTH

> The contractor shall take all reasonable precautions in the performance of the work under this contract to protect the safety and health of employees and of members of the public and shall comply with all applicable safety and health regulations and requirements (including reporting requirements) of DOE. The Contracting Officer shall notify in writing, the contractor of any noncompliance with the provisions of this clause and the corrective action to be taken. After receipt of such notice, the contractor shall immediately take such corrective action. The contractor shall submit a management program and implementation plan to the Contracting Officer for review and approval within 30 days after the date of award of this contract. In the event that the contractor fails to comply with said regulations or requirements of DOE, the Contracting Officer may, without prejudice to any other legal or contractual rights of DOE, issue an order stopping all or any part of the work; thereafter, a start order for resumption of the work may be issued at the discretion of the Contracting Officer. The contractor shall make no claim for an extension of time or for compensation or damages by reason of, or in connection with, such work stoppage.

(b) The clause set forth herein shall be included in those contracts or subcontracts for, and be made applicable to, work to be performed at a facility where DOE does not elect to assert its statutory authority to enforce occupational safety and health standards applicable to the working conditions of contractor and subcontractor employees, but does need to enforce radiological safety and health standards pursuant to provisions of the contract or subcontract rather than by reliance upon Nuclear Regulatory Commission licensing requirements (including agreements with states under section 274 of the Atomic Energy Act).

RADIATION PROTECTION AND NUCLEAR CRITICALITY

> The contractor shall take all reasonable precautions in the performance of work under this contract to protect the safety and health of employees and of members of the public against the hazards of ionizing radiation and radioactive materials and shall comply with all applicable radiation protection and nuclear criticality safety standards and requirements (including reporting requirements) of DOE. The contractor shall submit a management program and implementation plan to the Contracting Officer for review and approval within 30 days after the date of the award of this contract. In the event that the contractor fails to comply with said standards and requirements of DOE, the Contracting Officer may, without prejudice to any other legal or contractual rights of DOE, issue an order stopping all or any part of the work; thereafter, a start order for resumption of the work may be issued at the discretion of the Contracting Officer. The contractor shall make no claim for an extension of time or for compensation or damages by reason of or in connection with such work stoppage.

OMB Control No.: 1901—0021.

§9-50.704-3 Buy American Act (construction).

Cost-reimbursement operating and onsite service contracts which include construction work shall include the following clause:

BUY AMERICAN—OPERATING/ONSITE CONSTRUCTION

(a) In acquiring construction materials, the Buy American Act (41 U.S.C. 10 a-d) provides that the Government give preference to domestic construction material. For the purpose of this clause:

(1) "Construction" means construction, alteration, or repair of any public building or public work;

(2) "Components" means those articles, materials, and supplies which are directly incorporated in the construction material;

(3) "Construction material" means those articles, materials, and supplies which are brought to the construction site for incorporation in the building or work; and

(4) A "domestic construction material" means (i) an unmanufactured construction material which has been mined or produced in the United States; or (ii) a manufactured construction material which has been manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. For the purposes of this (a)(4)(ii), components of foreign origin of the same type or kind as the products referred to in (b)(2) or (3) of this clause shall be treated as components mined, produced, or manufactured in the United States.

(b) The contractor agrees that there will be used under this contract (by the contractor, subcontractor, materialmen, and suppliers) only domestic construction materials, except construction materials:

(1) Which are for use outside the United States;

(2) Which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality;

(3) As to which the Head of the Agency determines the domestic preference to be inconsistent with the public interest; or

(4) As to which the Head of the Agency determines the cost to the Government to be unreasonable.

(5) As to which the contractor, if specifically authorized to do so, has determined to be unavailable in accordance with FPR 1-18.602-1(b).

The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954.

OMB CONTROL NO.: 1901—0021.

§9-50.704-4 Classification.

In the performance of the work under this contract, the contractor shall assign classifications to all documents, material, and other work under equipment originated or generated by the contractor in accordance with classification guidance furnished to the contractor by DOE. Every subcontract and purchase order issued hereunder involving the origination or generation of classified documents, material, or equipment, shall include a provision to the effect that in the performance of such subcontract or purchase order, the subcontractor or supplier shall assign classifications to all such documents, material, and equipment in accordance with classification guidance furnished to such subcontractor or supplier by the contractor.

NOTE: This clause is required in all contracts involving classified information.

OMB CONTROL NO.: 1901—0021.

§9-50.704-5 Disclosure of information.

(a) It is mutually expected that the activities under this contract will not involve Restricted Data or other classified information or material. It is understood, however, that if in the opinion of either party, this expectation changes prior to the expiration or termination of all activities under this contract, said party shall notify the other party accordingly in writing without delay. In any event, the contractor shall classify, safeguard, and otherwise act with respect to all Restricted Data and other classified information and material, in accordance with applicable law and the requirements of DOE, and shall promptly inform DOE in writing if and when Restricted Data or other classified information or material becomes involved. If and when Restricted Data or other classified information or material becomes involved, or in the mutual judgment of the parties it appears likely that Restricted Data or other classified information or material may become involved, the contractor shall have the right to terminate performance of the work under this contract and in such event the provisions of this contract respecting termination for the convenience of the Government shall apply.

(b) The contractor shall not permit any individual to have access to Restricted Data or other classified information, except in accordance with the Atomic Energy Act of 1954, as amended, and DOE's regulations or requirements.

(c) The term "Restricted Data" as used in this article means all data concerning the design, manufacture, or utilization of atomic weapons, the production of special nuclear material or the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act of 1954, as amended.

NOTE: This clause should be used in place of the clauses entitled "Security", §9-50.704-1, and "Classification", §9-50.704-4, in contracts with educational institutions for off-site research that are not likely to produce Restricted Data or classified information.

OMB CONTROL NO.: 1901—0021.

§9-50.704-6 Nuclear hazards indemnity.

(a) This article is incorporated into this contract pursuant to the authority contained in subsection 170(d) of the Atomic Energy Act of 1954, as amended (hereinafter called the Act.)

(1) The definitions set out in the Act shall apply to this article.

(2) The term "contract location" means any DOE facility, installation, or site at which contractual activity under this contract is being carried on, and any contractor-owned or controlled facility, installation, or site at which the contractor is engaged in the performance of contractual activity under this contract.

(3) The term "extraordinary nuclear occurrence" means an event which DOE has determined to be an extraordinary nuclear occurrence as defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in Subpart E of 10 CFR 840.

(b) Except as hereafter permitted or required in writing by DOE, the contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability. DOE may at any time require in writing that the contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover public liability, arising out of or in connection with the contractual activity, provided that the costs of such financial protection will be reimbursed to the contractor by DOE.

(c) (1) To the extent that the contractor and other persons indemnified are not compensated by any financial protection, permitted or required by DOE or the Nuclear Regulatory Commission (NRC), DOE will indemnify the contractor and other persons indemnified against (i) claims for public liability as described in subparagraph (2) of this paragraph (c); and (ii) the reasonable costs of investigating and settling claims and defending suits for damage for such public liability, provided that DOE's liability, excluding such reasonable costs, under all indemnity agreements entered into by DOE under section 170 of the Act, including this contract, shall not exceed $500 million in the aggregate for each nuclear incident occurring within the United States or $100 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in paragraph (c)(1) of this section is public liability which (i) arises out of or in connection with the contractual activity; and (ii) arises out of or results from:

(A) A nuclear incident which takes place at a contract location; or

(B) A nuclear incident which takes place at any other location and arises out of or in the course of the performance of contractual activity under this contract by the contractor's employees, individual consultants, borrowed personnel or other persons for the consequences of whose acts or omissions the contractor is liable, provided that such incident is not covered by any other indemnity agreement entered into by DOE or the NRC pursuant to section 170 of the Act; or

(C) A nuclear incident which arises out of or in the course of transportation of source, special nuclear, or by-product materials to or from a contract location, provided such incident is not covered by any indemnity agreement entered into by DOE with the transporting carrier, or with a carrier's organization acting for the benefit of the transporting carrier, or with a licensee of NRC, pursuant to Section 170 of the Act; or

(D) A nuclear incident which involves items (such as equipment, material, facilities, or design or other data) produced or delivered under this contract, provided such incident is not covered by any other indemnity agreement entered into by DOE or NRC pursuant to Section 170 of the Act.

(d) In the event of an extraordinary nuclear occurrence which:

(1) Arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility, or

(2) Arises out of or results from or occurs in the course of transportation of source material, by-product material, or special nuclear material to or from a production or utilization facility, or

(3) During the course of the contract activity, arises out of or results from the possession, operation, or use by the contractor or a subcontractor of a device utilizing special nuclear material or by-product material.

DOE and the contractor on behalf of itself and other persons indemnified, insofar as their interests appear, each agrees to waive:

(i) Any issue or defense as to the conduct of the claimant or fault of persons indemnified, including, but not limited to:

(A) Negligence;

(B) Contributory negligence;

(C) Assumption of the risk; or

(D) Unforseeable intervening causes, whether involving the conduct of a third person or an act of God.

As used herein, "conduct of the claimant" includes conduct of persons through whom the claimant derives his cause of action;

(ii) Any issue or defense as to charitable or governmental immunity;

(iii) Any issue or defense based on any statute of limitations, if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof, but in no event more than 20 years after the date of the nuclear incident. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.

(e) The waivers set forth in paragraph (d) of this article:

(1) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;

(2) Shall not apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results fron a nuclear incident intentionally and wrongfully caused by the claimant;

(3) Shall not apply to injury to a claimant who is employed at the site of and in connection with the activity where the extraordinary nuclear occurrence takes place, if benefits therefore are either payable or required to be provided under any workmen's compensation or occupational disease law;

(4) Shall not apply to any claim for punitive or exemplary damages, provided, with respect to any claim for wrongful death under any State law which provides for damages only punitive in nature, this exclusion does not apply to the extent that the claimant has sustained actual damages, measured by the pecuniary injuries resulting from such death but not to exceed the maximum amount otherwise recoverable under such law;

(5) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;

(6) Shall be effective only with respect to those obligations set forth in this agreement and in insurance policies, contracts, or other proof of financial protection; and

(7) Shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the limit of liability provisions under subsection 170e of the Atomic Energy Act of 1954, as amended, and (ii) the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

(f) The contractor shall give immediate written notice to DOE of any known action or claim filed or made against the contractor or other person indemnified for public liability as defined in paragraphs (2) of section (c). Except as otherwise directed by DOE, the contractor shall furnish promptly to DOE, copies of all pertinent papers received by the contractor or filed with respect to such actions or claims. When DOE shall determine that the Government will probably be required to make indemnity payments under the provisions of section (c) above, DOE shall have the right to, and shall collaborate with, the contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right (1) to require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder, and (2) to appear through the Attorney General on behalf of the contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(g) The indemnity provided by this article shall not apply to public liability arising out of, or in connection with, any activity that is performed at a licensed facility, and that is covered by a Nuclear Regulatory Commission indemnity agreement authorized by Section 170 of the Act.

(h) The obligations of DOE under this article shall not be affected by any failure on the part of the contractor to fulfill its obligation under this contract and shall be unaffected by the death, disability, or termination of existence of the contractor, or by the completion, termination or expiration of this contract.

(i) The parties to this contract enter into this article upon the condition that this article may be amended at any time by the mutual written agreement of DOE and the contractor, and that such amendment may, by its express terms, provide that it will apply to any nuclear incidents which occur thereafter.

(j) The provisions of this article shall not be limited in any way by, and shall be interpreted without reference to, any other article of this contract , including Article _________, Disputes, provided, however, that the following provisions of this contract: Article _________ , Covenant Against Contingent Fees; Article _______, Officials Not to Benefit; Article _________ , Assignment; and Article ___, Examination of Records; and any provisions later added to this contract which under applicable Federal law, including statutes, executive orders and regulations, are required to be included in agreements of the type contained in this article, shall apply to this article.

(k) The following section will be included in those contracts containing indemnity agreements executed under the general contract authority of DOE.

To the extent that the Contractor is compensated by any financial protection, or is indemnified pursuant to this article, or is effectively relieved of public liability by an order or orders limiting same, pursuant to section 170e of the Atomic Energy Act of 1954, as amended, the provisions of Article _________ (General Authority Indemnity) shall not apply.

OMB CONTROL NO.: 1901—0021.

§9-50.704-7 Nuclear hazards indemnity - product liability.

(a) This article is incorporated into this contract pursuant to the authority contained in section 170d of the Atomic Energy Act of 1954, as amended (hereinafter called the Act).

(1) The definitions set out in the Act shall apply to this article.

(2) The term "product delivered under the contract" means any material; equipment, device, drawing, specification, or technical data made, prepared, or acquired by the contractor in the course of performance of the contract and delivered to DOE or to any other persons as directed or approved by DOE.

(b) Except as hereafter permitted or required in writing by DOE, the contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability. DOE may at any time require in writing that the contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover public liability against which the contractor is indemnified hereunder, provided that the costs of such financial protection will be reimbursed to the contractor by DOE.

(c)(1) To the extent that the contractor and other persons indemnified are not compensated by any financial protection permitted or required by DOE or NRC, DOE will indemnify the contractor, and other persons indemnified, against (i) claims for public liability as described in subparagraph (2) of this paragraph (c); and (ii) the reasonable costs of investigating and settling claims, and defending suits for damages for such public liability, provided that DOE's liability, excluding such reasonable costs, under all indemnity agreements entered into by DOE under section 170 of the Act, including this contract, shall not exceed $500 million in the aggregate for each nuclear incident occurring within the United States or $100 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in subparagraph (1) of this section is public liability which (i) arises out of, or in connection with, the contractual activity; and (ii) arises out of, or results from, a product delivered under the contract, but does not include liability for a nuclear incident which is covered by any other indemnity agreement entered into by DOE or NRC pursuant to Section 170 of the Act.

(d) The contractor shall give immediate written notice to DOE of any known action or claim filed or made against the contractor or other person indemnified for public liability as defined in paragraph (2) of section (c). Except as otherwise directed by DOE, the contractor shall furnish promptly to DOE copies of all pertinent papers received by the contractor or filed with respect to such actions of claims. When DOE shall determine that the Government will probably be required to make indemnity payments under the provisions of section (c) above, DOE shall have the right to, and shall collaborate with, the contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right, (1) to require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder, and (2) to appear through the Attorney General on behalf of the contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(e) The obligations of DOE under this article shall not be affected by any failure on the part of the contractor to fulfill its obligation under this contract, and shall be unaffected by the death, disability, or termination of existence of the contractor or by the completion, termination, or expiration of this contract.

(f) The parties to this contract enter into this article upon the condition that this article may be amended at any time by the mutual written agreement of DOE and the contractor and that such amendment may, by its express terms, provide that it will apply to any nuclear incidents which occur thereafter.

(g) The provisions of this article shall not be limited in any way by, and shall be interepreted without reference to, any other article of this contract, including Article __________ , Disputes, provided, however, that the following provisions of this contract: Article __________ , Covenant Against Contingent Fees; Article __________ , Officials Not to Benefit; Article __________ , Assignment; and Article __________ , Examination of Records; and any provisions later added to this contract which, under applicable Federal law, including statutes, executive orders, and regulations, are required to be included in agreements of this type contained in this article, shall apply to this article.

(h) The following section will be included in those contracts containing indemnity agreements executed under the general contract authority of DOE.

To the extent that the contractor is compensated by any financial protection, or is indemnified pursuant to this article, or is effectively relieved of public liability by an order or orders limiting same pursuant to section 170e of the Atomic Energy Act of 1954, as amended, the provisions of Article _________ (General Authority Indemnity) shall not apply.

OMB CONTROL NO.: 1901—0021.

§9-50.704-8 Indemnity assurance to architect-engineer or supplier prior to operation of a production or utilization facility.

(a)(1) The definitions set out in the Atomic Energy Act of 1954, as amended (hereinafter called the Act), shall apply to this article.

(2) The services or supplies furnished under this agreement are intended to be used in connection with the construction and/or operation of a production or utilization facility.

(3) DOE will use its best efforts to include in any contract for the operation of such facility, an agreement based on the then current approved form of indemnity agreement under section 170d of the Atomic Energy Act of 1954, as amended, whereby DOE will indemnify all persons indemnified, including the contractor, against public liability for nuclear incidents arising out of or in connection with contractual activities under the contract for the operation of said facility in accordance with the authority provided in subsection 170d of the Act.

(4)(i) DOE will enter into an indemnity agreement in accordance with the authority provided in subsection 170d of the Act with the contractor, without further consideration from the contractor, at any time when all of the following circumstances are present:

(A) The services or supplies furnished under this contract are being used in connection with any activity or situation which involves a risk of substantial nuclear incident; and

(B) There is not in effect an indemnity agreement as described in subparagraph (3) of this clause; and

(C) DOE's authority to enter into agreements of indemnification under section 170(d) of the Act has not expired or been so amended as to deprive DOE of authority to enter into such an agreement.

(b) In that agreement, DOE will indemnify the contractor and other persons indemnified against public liability arising out of, or in connection with, the contractual activity of this contract.

(c) Such agreement will be based on the then current approved form of section 170d indemnity agreement used in contracts between DOE and its contractors, and shall further include an obligation to indemnify the contractor, and persons indemnified for such public liability arising, out of or resulting from, nuclear incidents occurring between the time when the services or supplies furnished under this contract are first used in connection with any activity or situation which involves risk of a substantial nuclear incident and the time when such agreement is executed.

(d) The indemnity provided by DOE under all indemnity agreements entered into by DOE under section 170 of the Act, including this agreement, shall not exceed $500 million in the aggregate for each nuclear incident, without regard to the number of persons indemnified, excluding the reasonable costs of investigating and settling claims and defending suits for damages, provided, however, that with respect to incidents occuring outside the United States, such aggregate indemnity shall not exceed $100 million, including such reasonable costs.

OMB CONTROL NO.: 1901—0021.

§9-50.704-9 Accounts, records, and inspection.

(a) Accounts. The contractor shall maintain a separate and distinct set of accounts, records, documents, and other evidence showing and supporting all allowable costs incurred, revenues or other applicable credits, fixed-fee accruals, and the receipt, use, and disposition of all Government property coming into the possession of the contractor under this contract. The system of accounts employed by the contractor shall be satisfactory to DOE and in accordance with generally accepted accounting principles consistently applied.

NOTE: If the contract includes the clause for "price reduction for defective cost or pricing data" required by FPR 1-3.814-1, paragraph (a) above should be modified by adding the words "or anticipated to be incurred" after the words "allowable costs incurred."

(b) Inspection and audit of accounts and records. All books of account and records relating to this contract shall be subject to inspection and audit by DOE at all reasonable times, before and during the period of retention provided for in (d) below and the contractor shall afford DOE proper facilities for such inspection and audit.

(c) Audit of subcontractors' records. The contractor also agrees, with respect to any subcontracts (including lump-sum or unit-price subcontracts or purchase orders) where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor of any tier, to either conduct an audit of the subcontractor's cost or arrange for such an audit to be performed by the cognizant government audit agency through the Contracting Officer.

(d) Disposition of records. Except as agreed upon by the Government and the contractor, all financial and cost reports, books of account and supporting documents, and other data evidencing costs allowable, revenues, and other applicable credits under this contract, shall be the property of the Government, and shall be delivered to the Government or otherwise disposed of by the contractor either as the Contracting Officer may from time to time direct during the progress of the work or, in any event, as the Contracting Officer shall direct upon completion or termination of this contract and final audit of accounts hereunder. Except as provided in this contract, all other records in the possession of the contractor relating to this contract shall be preserved by the contractor for a period of three years after final payment under this contract or otherwise disposed of in such manner as may be agreed upon by the Government and the contractor.

(e) Reports. The contractor shall furnish such progress reports and schedules, financial and cost reports, and other reports concerning the work under this contract as the Contracting Officer may from time to time require.

(f) Inspections. The DOE shall have the right to inspect the work and activities of the contractor under this contract at such time and in such manner as it shall deem appropriate.

(g) Subcontracts. The contractor further agrees to require the inclusion of provisions similar to those in paragraphs (a) through this paragraph (g) of this clause in all subcontracts (including lump sum or unit-price subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor.

NOTE: If the prime contract contains a "defective cost or pricing data" clause, this paragraph (g) shall be modified by adding the following:

The contractor further agrees to include an audit clause, the substance of which is the "audit" clause in FPR 1-3.814-2, in each subcontract which does not include provisions similar to those in paragraphs (a) through this paragraph (g) of this clause, but which contains a "defective cost or pricing data" clause.

(h) Internal audit. The contractor agrees to conduct an internal audit and examination satisfactory to DOE of the records, operations, expenses, and the transactions with respect to costs claimed to be allowable under this contract annually and at such other times as may be mutually agreed upon. The results of such audit, including the working papers, shall be submitted or made available to the Contracting Officer.

NOTE: This provision shall be included in (a) all cost-type contracts (or subcontracts) involving an estimated cost exceeding $5 million and expected to run more than 2 years, and (b) any other cost-type contract (or subcontract) where deemed advisable by the

Head of the Procuring Activity and when the contractor (or subcontractor) already has an established internal audit organization.

OMB CONTROL NO.: 1901—0021.

§9-50.704-10 Alterations and additions.

The following alterations in or additons to the provisions of this form of contract were made prior to execution of the contract by the parties.

OMB CONTROL NO.: 1901—0021.

§9-50.704-11 Changes

(a) Changes and adjustment of fee. The Contracting Officer may at any time and without notice to the sureties, if any, issue written directions within the general scope of this contract requiring additional work or directing the omission of, or variation in, work covered by this contract. If any such direction results in a material change in the amount or character of the work described in the clause entitled "Statement of work," an equitable adjustment of the fixed fee shall be made in accordance with the agreement of the parties and the contract shall be modified in writing accordingly. Any claim by the contractor for an adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the contractor of the notification of change; provided, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. A failure to agree on an equitable adjustment under this clause shall be deemed to be a dispute within the meaning of the clause entitled "Disputes."

(b) Work to continue. Nothing contained in this clause shall excuse the contractor from proceeding with the prosecution of the work in accordance with the requirements of any direction hereunder.

OMB CONTROL NO.: 1901—0021.

§9-50.704-12 Contractor's organizations.

(a) Organization chart. As promptly as possible after the execution of this Contract, the contractor shall furnish to the Contracting Officer a chart showing the names, duties, and organization key personnel to be employed in connection with the work, and shall furnish from time to time supplementary information reflecting changes therein.

(b) Supervising representative of contractor. Unless otherwise directed by the Contracting Officer, a competent full-time resident supervising representative of the contractor satisfactory to the Contracting Officer shall be in charge of the work at the site at all times. This also applies to off-site work.

(c) Control of employees. The contractor shall be responsible for maintaining satisfactory standards of employee competency, conduct, and integrity and shall be responsible for taking such disciplinary action with respect to his employees as may be necessary. In the event the contractor fails to remove any employee from the contract work whom DOE deems incompetent, careless, or insubordinate, or whose continued employment on the work is deemed by DOE to be contrary to the public interest, the Government reserves the right to require the contractor to remove the employee.

NOTE: In contracts identified in §9-50.1213-2(b), the following paragraph shall be substituted for (c) above:

"(c) The contractor shall be responsible for maintaining satisfactory standards of employee competency, conduct, and integrity and shall be responsible for taking such disciplinary action with respect to his employees as may be necessary. The contractor shall establish such standards and procedures as are necessary to implement effectively the provisions set forth in §9-50.12, and such standards and procedures shall be subject to the approval of the Contracting Officer."

OMB CONTROL NO.: 1901—0021.

§9-50.704-13 Allowable costs and fixed-fee (CPFF operating and construction contracts).

(a) Compensation for contractor's services. Payment for the allowable cost as hereinafter defined, and of the fixed-fee, if any, as hereinafter provided, shall constitute full and complete compensation for the performance of the work under this contract.

(b) Fixed-fee. The fixed-fee payable to the contractor for the performance of the work under this contract is $ _________ . There shall be no adjustment in the amount of the contractor's fixed-fee by reason of differences between any estimate of cost for performance of the work under this contract and the actual cost for performance of that work. Note: This provision may be appropriately changed to cover situations where the fee is for a period of time or different fees are allowed for various phases of the work.

(c) Allowable cost. The allowable cost of performing the work under this contract shall be the costs and expenses that are actually incurred by the contractor in the performance of the contract work in accordance with its terms, that are necessary or incident thereto, and are determined to be allowable pursuant to this paragraph (c). The determination of the allowability of cost hereunder shall be based on: (1) Reasonableness, including the exercise of prudent business judgment; (2) consistent application of generally accepted accounting principles and practices that result in equitable charges to the contract work; and (3) recognition of all exclusions and limitations set forth in this clause or elsewhere in this contract as to types or amounts of items of cost. Allowable cost shall not include cost of any item described as unallowable in paragraph (e) of this clause except as indicated therein. Failure to mention an item of cost specifically in paragraph (d) or paragraph (e) shall not imply either that it is allowable or that it is unallowable.

(d) Examples of items of allowable cost. Subject to the other provisions of this clause, the following examples of items of cost of work done under this contract shall be allowable to the extent indicated:

(1) Bonds and insurance, including self-insurance, as provided in the clause entitled "Required bonds and insurance—exclusive of Government property."

(2) Communication costs, including telephone services, local and long-distance calls, telegrams, cablegrams, radiograms, postage, and similar items.

(3) Consulting services (including legal and accounting), and related expenses, as approved by the Contracting Officer, except as made unallowable by paragraph (e)(26).

(4) Litigation expenses, including reasonable Counsel fees, incurred in accordance with the clause of this contract entitled "Litigation and claims."

(5) Losses and expenses (including settlements made with the consent of the Contracting Officer) sustained by the contractor in the performance of this contract and certified in writing by the Contracting Officer to be just and reasonable, except the losses and expenses expressly made unallowable under other provisions of this contract.

(6) Materials, supplies, and equipment, including freight transportation, material handling, inspection, storage, salvage, and other usual expenses incident to the procurement, use and disposition thereof, subject to approvals required under other provisions of this contract.

(7) Patents, purchased design, and royalty payments to the extent expressly provided for under other provisions in this contract or as approved by the Contracting Officer, and preparation of invention disclosures, reports and related documents, and searching the art to the extent necessary to make such invention disclosures in accordance with the Patent Rights clause of this contract.

(8) Personnel costs and related expenses incurred in accordance with the personnel appendix which is hereby incorporated by reference and made a part of this contract. It is specifically understood and agreed that said personnel appendix sets forth in detail personnel costs and related expenses to be allowable under this contract and is intended to document those personnel policies, practices and plans which have been found acceptable by the Contracting Officer. It is further understood and agreed that the contractor will advise DOE of any proposed changes in any matters covered by said policies, practices or plans which relate to this item of cost, and that the personnel appendix may be modified from time to time in writing by mutual agreement of the contractor and DOE without execution of

an amendment to this contract for the purpose of effectuating any such changes in, or additions to, said personnel appendix as may be agreed upon by the parties. Such modifications shall be evidenced by execution of written numbered approval letters from the Contracting Officer or his representative. Examples of personnel costs and related expenses to be incorporated into the personnel appendix, or amendments thereto, are as follows:

(i) Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; nonwork time, including vacations, holidays, sick, funeral, military, jury, witness, and voting leave; salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees, provided however, that the Contracting Officer's approval is required in each instance of total compensation to an individual employee at an annual rate of $ _________ (See §9-50.2002) or more, when it is proposed that a total of 50 percent or more of such compensation be reimbursed under DOE cost-type contracts. Total compensation, as used here, includes only the employee's base salary, bonus, and incentive compensation payments;

(ii) Legally required contributions to old-age and survivors' insurance, unemployment compensation plans, and workmen's compensation plans, (whether or not covered by insurance); voluntary or agreed-upon plans providing benefits for retirement, separation, life insurance, hospitalization, medical-surgical and unemployment (whether or not such plans are covered by insurance);

(iii) Travel (except foreign travel, which requires specific approval by the Contracting Officer on a case-by-case basis); incidental subsistence and other allowances of contractor employees, in connection with performance of work under this contract (including new employees reporting for work and transfer of employees, the transfer of their household goods and effects and the travel and subsistence of their dependents);

(iv) Employee relations, welfare, morale, etc.; programs including incentive or suggestion awards; employee counseling services, health or first-aid clinics; and house or employee publications;

(v) Personnel training (except special education and training courses and research assignments calling for attendance at educational institutions which require specific approval by the Contracting Officer on a case-by-case basis); including apprenticeship training programs designed to improve efficiency and productivity of contract operations, to develop needed skills, and to develop scientific and technical personnel in specialized fields required in the contract work;

(vi) Recruitment of personnel (including help-wanted advertisement), including services of employment agencies at rates not in excess of standard commercial rates, employment office, travel of prospective employees at the request of the contractor for employment interviews; and

(vii) Net cost of operating plant-site cafeteria, dining rooms, and canteens attributable to the performance of the contract.

NOTE: In appropriate circumstances, the lead sentence in subparagraph (8) may be changed to read as follows: "Personnel costs and related expenses incurred in accordance with established policies, programs, and schedules, and any changes thereto during the contract term, applicable to the contractor's private operations and consistently followed throughout his organization, as approved by the Contracting Officer, such as:

(9) Repairs, maintenance, inspection, replacement, and disposal of Government-owned property and the restoration or clean-up of site and facilities to the extent directed or approved by the Contracting Officer.

(10) Subcontracts and purchase orders, including procurements from contractor-controlled sources, subject to approvals required by other provisions of this contract.

(11) Subscriptions to trade, business, technical, and professional periodicals, as approved by the Contracting Officer.

(12) Taxes, fees, and charges levied by public agencies which the contractor is required by law to pay, except those which are expressly made unallowable under other provisions of this contract.

(13) Utility services, including electricity, gas, water, and sewerage.

(14) Indemnification of the Pension Benefit Guaranty Corporation, pursuant to the Employee Retirement Income Security Act of 1974, in accordance with §9-15.205-6.

(15) Establishment and maintenance of bank accounts in connection with the work hereunder, including, but not limited to, service charges, the cost of disbursing cash, necessary guards, cashiers, and paymasters, if payments are made by check, facilities and arrangements for cashing checks may be provided without expense to the employees, subject to the approval of the Contracting Officer.

The following additional examples of items are for use in construction contracts:

(16) Camp operations, to the extent approved by the Contracting Officer.

(17) Maintenance, inspection, repair, replacement, and transportation of construction plant and equipment to the extent not covered by rentals or insurance and as provided in rental agreements approved by the Contracting Officer or in Appendix B to this contract.

(18) Rental for (i) construction plant and equipment rented by the contractor from others at rates and under written agreements approved by the Contracting Officer, and (ii) construction plant and equipment owned and furnished by the contractor under Appendix B to this contract.

(e) Examples of items of unallowable costs. The following examples of items of costs are unallowable under this contract to the extent indicated:

(1) Advertising, except (i) help-wanted advertising, and (ii) other advertising (such as costs of participation in exhibits) approved by the Contracting Officer as clearly in furtherance of work performed under the contract.

(2) Bad debts (including expenses of collection) and provisions for bad debts arising out of other business of the contractor.

(3) Bidding expenses and costs of proposals.

(4) Bonuses and similar compensation under any other name, which (i) are not pursuant to an agreement between the contractor and employee prior to the rendering of the services or an established plan consistently followed by the contractor, (ii) are in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder, or (iii) provide total compensation to an employee in excess of reasonable compensation for the services rendered.

(5) Central and branch office expenses of the contractor, except as specifically set forth in the contract.

(6) Commissions, bonuses, and fees (under whatever name) in connection with obtaining or negotiating for a Government contract or a modification thereto, except when paid to bona fide employees or bona fide established selling organizations maintained by the contractor for the purpose of obtaining Government business.

(7) Contingency reserves, provisions for.

(8) Contributions and donations.

(9) Depreciation in excess of that calculated by application of methods approved for use by the Internal Revenue Service under the Internal Revenue Code of 1954, as amended, including the straight-line, declining balance (using a rate not exceeding twice the rate which would have been used had the depreciation been computed under the straight-line method), or sum-of-the-years digits method, on the basis of expected useful life, to the cost of acquisition of the related fixed assets less estimated salvage or residual value at the end of the expected useful life.

(10) Dividend provisions or payments and, in the case of sole proprietors and partners, distributions of profit.

(11) Entertainment costs, except the costs of such recreational activities for on-site employees as may be approved by the Contracting Officer or provided for elsewhere in this contract.

(12) Fines and penalties, including assessed interest, resulting from violations of, or failure of, the contractor to comply with Federal, State, or local laws or regulations, except when incurred in accordance with the written approval

of the Contracting Officer or as a result of compliance with the provisions of this contract.

(13) Government-furnished property, except to the extent that cash payment therefor is required pursuant to procedures of DOE applicable to transfers of such property to the contractor from others.

(14) Insurance (including any provision of a self-insurance reserve) on any person where the contractor under the insurance policy is the beneficiary, directly or indirectly, and insurance against loss of or damage to Government property as defined in Clause _________.

(15) Interest, however represented (except interest incurred in compliance with the clause entitled "State and local taxes"), bond discounts and expenses, and costs of financing and refinancing operations.

(16) Legal, accounting, and consulting services and related costs incurred in connection with the preparation of prospectuses, preparation and issuance of stock, rights, organization or reorganization, prosecution or defense of antitrust suits, prosecution of claims against the United States, contesting actions or proposed actions of the United States, and prosecution or defense of patent infringement litigation.

(17) Losses (including litigation expenses, Counsel fees, and settlements) on, or arising from the sale, exchange, or abandonment of capital assets, including investments; losses on other contracts, including the contractor's contributed portion under cost-sharing contracts; losses in connection with price reductions to and discount purchases by employees and others from any source; and losses where such losses or expenses

(i) Are compensated for by insurance or otherwise or which would have been compensated by insurance required by law or by written direction of the Contracting Officer but which the contractor failed to procure or maintain through its own fault or negligence;

(ii) Result from willful misconduct or lack of good faith on the part of any of the contractor's directors, corporate officers, or a supervising representative of the contractor, as defined in Clause ____ of this contract.

(iii) Represent liabilities to third persons for which the contractor has expressly accepted responsibility under other terms of this contract.

(18) Maintenance, depreciation, and other costs incidental to the contractor's idle or excess facilities (including machinery and equipment), other than reasonable standby facilities.

NOTE: May be omitted when no contractor-owned equipment is being utilized in the performance of the contract.

(19) Membership in trade, business, and professional organizations, except as approved by the Contracting Officer.

(20) Precontract costs, except as expressly made allowable under other provisions in this contract.

(21) Research and development costs, unless specifically provided for elsewhere in this contract.

(22) Selling costs, except to the extent they are determined to be reasonable and to be allocable to the contract. Allocability of selling costs to the contract will be determined in the light of reasonable benefit to the agency program arising from such activities as technical, consulting, demonstration, and other services performed for such purposes as applying or adapting the contractor's product for agency use.

(23) Storage of records pertaining to this contract after completion of operations under this contract, irrespective of contractual or statutory requirement of the preservation of records.

(24) Taxes, fees, and charges in connection with financing, refinancing, or refunding operations, including the listing of securities on exchanges, taxes which are paid contrary to the clause entitled "State and local taxes", federal taxes on net income and excess profits, special assessments on land which represent capital improvement and taxes on accumulated funding deficiencies of, or prohibited transactions involving, employee deferred compensation plans pursuant to Section 4971 or Section 4975 of the Internal Revenue Code of 1954, as amended,

respectively.

(25) Travel expenses of the officers, proprietors, executives, administrative heads and other employees of the contractor's central office or branch office organizations concerned with the general management, supervision, and conduct of the contractor's business as a whole, except to the extent that particular travel is in connection with the contract and approved by the Contracting Officer.

(26) Salary or other compensation (and expenses related thereto) of any individual employed under this contract as a consultant or in another comparable employment capacity who is an employee of another organization and concurrently performing work on a full-time annual basis for that organization under a cost-type contract with DOE, except to the extent that cash payment therefor is required pursuant to the provisions of this contract or procedure of DOE applicable to the borrowing of such an individual from another cost-type contractor.

(27) First-class air travel in excess of the cost of less than first-class air accommodations, except when less than first-class accommodations are not reasonably available to meet necessary mission requirements, such as where less than first-class accommodations would:

(i) Require circuitous routing,

(ii) Require travel during unreasonable hours,

(iii) Greatly increase the duration of the flight,

(iv) Result in additional costs which would offset the transportation savings, or

(v) Offer accommodations which are not reasonably adequate for the medical needs of the traveler.

(28) Special construction industry "funds" financed by employer contributions for such purposes as methods and materials research, public and industry relations, market development, and disaster relief, except as specifically provided elsewhere in this contract.

(29) Late premium payment charges related to employee deferred compensation plan insurance, in accordance with §9-15.205-16.

(30) Facilities capital cost of money. (CAS-414).

OMB CONTROL NO.: 1901—0021.

§9-50.704-14. Allowable costs and fixed-fee (on-site service contracts)

(a) Compensation for contractor's services. Payment for the allowable cost as hereinafter defined, and of the fixed-fee, if any, as hereinafter provided, shall constitute full and complete compensation for the performance of the work under this contract.

(b) Fixed-fee. The fixed-fee payable to the contractor for the performance of the work under this contract is $ _________ . There shall be no adjustment in the amount of the contractor's fixed-fee by reason of differences between any estimate of cost for performance of the work under this contract and the actual cost for performance of that work.

NOTE: This provision may appropriately be changed to cover situations where the fee is for a period of time, or different fees are allowed for various phases of the work.

(c) Allowable cost. The allowable cost of performing the work under this contract shall be the costs and expenses that are actually incurred by the contractor, are applicable and properly chargeable, either as directly incident or as allocable through appropriate distribution or apportionment, to the performance of the contract work in accordance with its terms, and are determined to be allowable pursuant to this paragraph (c). The determination of the allowability of cost hereunder shall be based on (1) reasonableness, including the exercise of prudent business judgment, (2) consistent application of generally accepted accounting principles and practices that result in equitable charges to the contract work, and (3) recognition of all exclusions and limitations set forth in this clause or elsewhere in this contract as to types or amounts of items of cost. Allowable cost shall not include cost of any item described as unallowable in paragraph (e) of this clause, except as indicated therein. Failure to mention an item of cost specifically in paragraph (d) or paragraph (e) shall not imply either that it is allowable or that it is unallowable.

(d) Examples of items of allowable cost. Subject to the other provisions of this clause, the following examples of items of cost of work under this contract shall be allowable to the extent indicated:

(1) Bonds and insurance (including self-insurance) as provided in the clause entitled "required bonds and insurance - exclusive of Government property."

(2) Communication costs, including telephone services, local and long-distance telephone calls, telegrams, cablegrams, radiograms, postage, and similar items.

(3) Consulting services (including legal and accounting) and related expenses, as approved by the Contracting Officer, except as made unallowable by paragraph (e)(24).

(4) Litigation expenses, including reasonable Counsel fees, incurred in accordance with the clause of this contract entitled "Litigation and Claims."

(5) Losses and expenses (including settlements made with the consent of the Contracting Officer) sustained by the contractor in the performance of this contract and certified in writing by the Contracting Officer to be just and reasonable, except the losses and expenses expressly made unallowable under other provisions of this contract.

(6) Materials and supplies (including those withdrawn from common stores costed in accordance with any generally recognized method that is consistently applied by the contractor and productive of equitable results).

(7) Patents, purchased design, and royalty payments to the extent expressly provided for under other provisions in this contract or as approved by the Contracting Officer; and preparation of invention disclosures, reports, and related documents, and searching the art to the extent necessary to make such invention disclosures in accordance with the Patent Rights clause of this contract.

(8) Personnel costs and related expenses incurred in accordance with the personnel appendix which is hereby incorporated by reference and made a part of this contract. It is specifically understood and agreed that said personnel appendix sets forth, in detail, personnel costs and related expenses to be allowable under this contract and is intended to document those personnel policies, practices and plans which have been found acceptable by the Contracting Officer. It is further understood and agreed that the contractor will advise DOE of any proposed changes in any matters covered by said policies, practices or plans which relate to this item of cost, and that the personnel appendix may be modified from time to time in writing by mutual agreement of the contractor and DOE without execution of an amendment to this contract for the purpose of effectuating any such changes in, or additions to, said personnel appendix, as may be agreed upon by the parties. Such modifications shall be evidenced by execution of written numbered approval letters from the Contracting Officer or his representative. Examples of personnel costs and related expenses to be incorporated into the personnel appendix, or amendments thereto, are as follows:

(i) Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; nonwork time including vacations, holidays, sick, funeral, military, jury, witness, and voting leave; salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees, provided, however, that the Contracting Officer's approval is required in each instance of total compensation to an individual employee at an annual rate of $ __________ (See §9-50.2002) or more, when it is proposed that a total of 50 percent or more of such compensation be reimbursed under DOE cost-type contracts. Total compensation, as used here, includes only the employee's base salary and bonus and incentive compensation payments.

(ii) Legally required contributions to old-age and survivors' insurance, unemployment, compensation plans, and workmen's compensation plans (whether or not covered by insurance); voluntary or agreed-upon plans providing benefits for retirement, separation, life insurance, hospitalization, medical-surgical and unemployment (whether or not such plans are covered by insurance);

(iii) Travel (except foreign-travel, which requires specific approval by the Contracting Officer on a case-by-case basis); incidental subsistence and other allowances of contractor employees, in connection with performance of work under this contract (including new employees reporting for work and transfer of employees, the transfer of their household goods and effects, and the travel and subsistence of their dependents);

(iv) Employee relations, welfare, morale, etc., programs, including incentive or suggestion awards, employee counseling services, health or first-aid clinics, and house or employee publications;

(v) Personnel training (except special education and training courses and research assignments calling for attendance at educational institutions which require specific approval by the Contracting Officer on a case-by-case basis) including apprenticeship training programs designed to improve efficiency and productivity of contract operations, to develop needed skills and to develop scientific and technical personnel in specialized fields required in the contract work;

(vi) Recruitment of personnel (including help-wanted advertisement) including services of employment agencies at rates not in excess of standard commercial rates, employment office, travel of prospective employees at the request of the contractor for employment interviews; and

(vii) Net cost of operating plant-site cafeterias, dining rooms, and canteens attributable to the performance of the contract.

NOTE: In appropriate circumstances the lead sentence in subparagraph (8) may be changed to read as follows: "Personnel costs and related expenses incurred in accordance with established policies, programs, and schedules, and any changes thereto during the contract term, applicable to the contractor's private operations and consistently followed throughout his organization, as approved by the Contracting Officer, such as:"

(9) Rentals and leases of land, buildings and equipment owned by third parties where such items are used in the performance of the contract, except that such rentals and leases directly chargeable to the contract shall be subject to approval by the Contracting Officer.

(10) Repairs, maintenance, inspection, replacement, and disposal of Government-owned property to the extent directed or approved by the Contracting Officer.

(11) Repairs, maintenance, and inspection of contractor-owned property used in connection with the performance of this contract, including reasonable standby facilities, which are due to ordinary wear and tear from use and the action of the elements, provided such maintenance and repairs keep the property in efficient operating condition and do not add to its permanent value or appreciably prolong its intended useful life; and major repairs (including replacement) to such property, as directed or approved by the Contracting Officer when charged directly to the contract.

(12) Special tooling, including jigs, dies, fixtures, molds, patterns, designs and drawings, tools, and equipment of a specialized nature generally useful to the contractor only in the performance of this contract.

NOTE: Itemize any additional special equipment which may be appropriate, such as loops, mockups, experimental setups, etc.

(13) Subcontracts, purchase orders, and procurements from contractor-controlled sources, subject to approvals required by other provisions of this contract.

(14) Subscriptions to trade, business, technical, and professional periodicals, as approved by the Contracting Officer when charged directly to the contract.

(15) Taxes, fees, and charges levied by public agencies which the contractor is required by law to pay, except those which are expressly made unallowable under other provisions of this contract.

(16) Utility services, including electricity, gas, water, steam, and sewerage.

(17) (Reserved).

(18) (Reserved).

(19) Indemnification of the Pension Benefit Guaranty Corporation pursuant to the Employee Retirement Income Security Act of 1974, in accordance with §9-15.205-6, notwithstanding the provisions of §9-50.704-14(e)(15)(i).

(e) Examples of items of unallowable costs. The following examples of items of costs are unallowable under this contract to the extent indicated:

(1) Advertising, except (i) help-wanted advertising, and (ii) other advertising (such as costs of participation in exhibits) approved by the Contracting Officer as clearly in furtherance of work performed under the contract.

(2) Bad debts (including expenses of collection) and provisions for bad debts not arising out of the performance of this contract.

(3) Bonuses and similar compensation under any other name, which (i) are not pursuant to an agreement between the contractor and employee prior to the rendering of the services or an established plan consistently followed by the contractor, (ii) are in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder, or (iii) provide total compensation to an employee in excess of reasonable compensation for the services rendered.

(4) Commissions, bonuses, and fees (under whatever name) in connection with obtaining or negotiating for a Government contract or a modification thereto, except when paid to bona fide employees or bona fide established selling organizations maintained by the contractor for the purpose of obtaining Government business.

(5) Contingency reserves, provisions for (except provisions for reserves under a self-insurance program to the extent that the type, coverage, rates, and premiums would be allowable if commercial insurance were purchased to cover the same risk, as approved by the Contracting Officer).

(6) Contributions and donations.

(7) Depreciation in excess of that calculated by application of methods approved for use by the Internal Revenue Service under the Internal Revenue Code of 1954, as amended, including the straight-line declining balance (using a rate not exceeding twice the rate which would have been used had the depreciation been computed under the straight-line method) or sum-of-the-years digits method, on the basis of expected useful life, to the cost of acquisition of the related fixed assets less estimated salvage or residual value at the end of the expected useful life. Amortization or depreciation of unrealized appreciation of values of assets or of assets fully amortized or depreciated on the contractor's books of account is unallowable.

(8) Dividend provisions or payments and, in the case of sole proprietors and partners, distributions of profits.

(9) Entertainment costs, except the costs of such recreational activities for on-site employees as may be approved by the Contracting Officer or provided for elsewhere in this contract.

(10) Fines and penalties, including assessed interest, resulting from violations of, or failure of, the contractor to comply with Federal, State, or local laws, or regulations, except when incurred in accordance with written approval of the Contracting Officer or as a result of compliance with the provisions of this contract.

(11) Government-furnished property, except to the extent that cash payment therefor is required pursuant to procedures of the DOE applicable to transfers of such property to the contractor from others.

(12) Insurance (including any provision of a self-insurance reserve) on any person where the contractor under the insurance policy is the beneficiary, directly or indirectly, and insurance against loss or damage to Government property as defined in Clause _________.

(13) Interest, however represented (except interest incurred in compliance with the clause entitled "State and Local Taxes"), bond discounts and expenses, and costs of financing and refinancing operations.

(14) Legal, accounting, and consulting services, and related costs incurred in connection with the preparation of prospectuses, preparation and issuance of stock rights, organization or reorganization, prosecution or defense of antitrust suits, prosecution of claims against the United States, contesting actions or proposed actions of the United States, and prosecution or defense of patent infringement litigation.

(15) Losses, including litigation expenses. Counsel fees, and settlement on, or arising from the sale, exchange, or abandonment of capital assets, including investments; losses on other contracts, including the contractor's contributed portion under cost-sharing contracts, losses in connection with price reduction to and discount purchases by employees and others from any source; and losses where such losses or expenses,

(i) Are compensated for by insurance or otherwise, or which would have been compensated by insurance required by law or by written direction of the Contracting Officer, but which the contractor failed to procure or maintain through its own fault or negligence, or which could have been covered by permissible insurance in keeping with ordinary business practice, but which the contractor failed to secure or maintain;

(ii) Result from willful misconduct or lack of good faith on the part of any of the contractor's directors, corporate officers, or a supervising representative of the contractor, as defined in Clause ____ of this contract;

(iii) Represent liabilities to third persons for which the contractor has expressly accepted responsibility under other terms of this contract.

(16) Maintenance, depreciation, and other costs incidental to the contractor's idle or excess facilities (including machinery and equipment) other than reasonable standby facilities.

(17) Membership in trade, business, and professional organizations except as approved by the Contracting Officer.

(18) Precontract costs, except as expressly made allowable under other provisions in this contract.

(19) Reconversion, alteration, restoration, or rehabilitation of the contractor's facilities, except as expressly provided elsewhere in this contract.

(20) (Reserved).

(21) Selling costs, except to the extent they are determined to be reasonable and to be allocable to the contract. Allocability of selling costs to the contract will be determined in the light of reasonable benefit to the agency program arising from such activities as technical, consulting, demonstration, and other services performed for such purposes as applying or adapting the contractor's product for agency use.

(22) Storage of records pertaining to this contract after completion of operations under this contract irrespective of contractual or statutory requirement for the preservation of records.

(23) Taxes, fees, and charges in connection with financing, refinancing or refunding operations, including the listing of securities on exchanges; taxes which are paid contrary to the clause entitled "State and local taxes;" Federal taxes on net income and excess profits; special assessments on land which represent capital improvement and taxes on accumulated funding deficiencies of, or prohibited transactions involving, employee deferred compensation plans pursuant to Section 4971 or Section 4975 of the Internal Revenue Code of 1954, as amended, respectively.

(24) Salary or other compensation (and expenses related thereto) of any individual employed under this contract as a consultant or in another comparable employment capacity who is an employee of another organization and concurrently performing work on a full-time annual basis for that organization under a cost-type contract with the DOE, except to the extent that cash payment therefor is required pursuant to the provisions of this contract or procedures of the DOE applicable to the borrowing of such an individual from another cost-type contractor.

(25) First-class air travel in excess of the cost of less than first-class air accomodations, except when less than first-class accommodations are not reasonably available to meet necessary mission requirements, such as, where less than first-class accommodations would:

(i) Require circuitous routing,

(ii) Require travel during unreasonable hours,

(iii) Greatly increase the duration of the flight,

(iv) Result in additional costs which would offset the transportation savings, or

(v) Offer accommodations which are not reasonably adequate for the medical needs of the traveler.

(26) Late premium payment charges related to employee deferred compensation plan insurance, in accordance with §9-15.205-16.

(27) Research and development costs, unless specifically provided for elsewhere in this contract.

(28) Bidding expenses and costs of proposals.

(29) Facilities capital cost of money (CAS-414).

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§9-50.704-15 (Reserved).

§9-50.704-16 Allowable costs and fixed-fee (architect-engineer contracts).

(a) Compensation for contractor's services. Payment for the allowable cost as hereinafter defined, and of the fixed-fee, if any, hereinafter provided, shall constitute full and complete compensation for the performance of the work under this contract.

(b) Fixed-fee. The fixed-fee payable to the contractor for the performance of the work under this contract is $ _________. There shall be no adjustment in the amount of the contractor's fixed-fee by reason of differences between any estimate of cost for performance of the work under this contract and the actual cost for performance of that work.

NOTE: This provision may appropriately be changed to cover situations where the fee is for a period of time, or different fees are allowed for various phases of the work.

(c) Allowable cost. The allowable cost of performing the work under this contract shall be the costs and expenses that are actually incurred by the contractor, are applicable and properly chargeable, either as directly incident or as allocable through appropriate distribution or apportionment, to the performance of the contract work in accordance with its terms and are determined to be allowable pursuant to this paragraph (c). The determination of the allowability of cost hereunder shall be based on: (1) reasonableness, including the exercise of prudent business judgment, (2) consistent application of generally accepted accounting principles and practices that result in equitable charges to the contract work, and (3) recognition of all exclusions and limitations set forth in this clause or elsewhere in this contract as to types or amounts of items of cost. Allowable cost shall not include cost of any item described as unallowable in paragraph (e) of this clause, except as indicated therein. Failure to mention an item of cost specifically in paragraph (d) or paragraph (e) shall not imply either that it is allowable or that it is unallowable.

(d) Examples of items of allowable cost. Subject to the other provisions of this clause, the following examples of items of cost of work under this contract shall be allowable to the extent indicated.

(1) Bonds and insurance (including self-insurance) as provided in the clause entitled "Required bonds and insurance - exclusive of Government property."

(2) Communication costs, including telephone services, local, and long-distance telephone calls, telegrams, cablegrams, radiograms, postage, and similar items.

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(3) Consulting services (including legal and accounting) and related expenses, as approved by the Contracting Officer, except as made unallowable by paragraph (e)(22).

(4) Litigation expenses, including reasonable Counsel fees, incurred in accordance with the clause of this contract entitled "Litigation and claims."

(5) Losses and expenses (including settlements made with the consent of the Contracting Officer) sustained by the contractor in the performance of this contract and certified in writing by the Contracting Officer to be just and reasonable, except the losses and expenses expressly made unallowable under other provisions of this contract.

(6) Materials, supplies, and equipment, including freight, transportation, material handling, inspection, storage, salvage, and other usual expenses incident to the procurement, use, and disposition thereof, subject to approvals required under other provisions of this contract.

(7) Royalty payments and patent costs:

(i) Royalties and other costs for use of patents in accordance with FPR 1-15.205-36.

(ii) Patent costs in accordance with FPR 1-15.205-26.

(8) Personnel costs and related expenses incurred in accordance with the personnel appendix which is hereby incorporated by reference and made a part of this contract. It is specifically understood and agreed that said personnel appendix sets forth in detail personnel costs and related expenses to be allowable under this contract and is intended to document those personnel policies, practices and plans which have been found acceptable by the Contracting Officer. It is further understood and agreed that the contractor will advise DOE of any proposed changes in any matters covered by said personnel appendix or of any proposed additional policies, practices or plans which relate to this item of cost, and that the personnel appendix may be modified from time to time in writing by mutual agreement of the contractor and DOE without execution of an amendment to this contract for the purpose of effectuating any such changes in or additions to said personnel appendix as may be agreed upon by the parties. Such modifications shall be evidenced by execution of written numbered approval letters from the Contracting Officer or his representative. Examples of personnel costs and related expenses to be incorporated into the personnel appendix, or amendments thereto, are as follows:

(i) Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; nonwork time, including vacations, holidays, sick, funeral, military, jury, witness, and voting leave; salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees, provided, however, that the Contracting Officer's approval is required in each instance of total compensation to an individual employee at an annual rate of $ __________ (See §9-50.2002) or more, when it is proposed that a total of 50 percent or more of such compensation be reimbursed under DOE cost-type contracts. Total compensation, as used here, includes only the employee's base salary and bonus and incentive compensation payments.

(ii) Legally required contributions to old-age and survivors' insurance, unemployment compensation plans and workmen's compensation plans (whether or not covered by insurance); voluntary or agreed-upon plans providing benefits for retirement, separation, life insurance, hospitalization, medical-surgical and unemployment (whether or not such plans are covered by insurance);

(iii) Travel (except foreign travel, which requires specific approval by the Contracting Officer on a case-by-case basis); incidental subsistence and other allowances of contractor employees, in connection with performance of work under this contract (including new employees reporting for work and transfer of employees, the transfer of their household goods and effects, and the travel and subsistence of their dependents);

(iv) Employee relations, welfare, morale, etc., programs, including incentive or suggestion awards, employee counseling services, health or first-aid clinics, and house or employee publications;

(v) Personnel training (except special education and training courses and research assignments calling for attendance at educational institutions which require specific approval by the Contracting Officer on a case-by-case basis) including apprenticeship training programs designed to improve efficiency and productivity of contract operations, to develop needed skills, and to develop scientific and technical personnel in specialized fields required in the contract work; and

(vi) Recruitment of personnel (including help-wanted advertisement) including services of employment agencies at rates not in excess of standard commercial rates, employment office, and travel of prospective employees at the request of the contractor for employment interviews.

NOTE: In appropriate circumstances, the lead sentence in subparagraph (8) may be changed to read as follows: "Personnel costs and related expenses incurred in accordance with established policies, programs, and schedules, and any changes thereto during the contract term, applicable to the contractor's private operations and consistently followed throughout his organization, as approved by the Contracting Officer, such as:"

(9) Rentals and leases of land, buildings, and equipment owned by third parties where such items are used in the performance of the contract, except that such rentals and leases when directly chargeable to the contract shall be subject to approval by the Contracting Officer.

(10) Repairs, maintenance, inspection, replacement, and disposal of Government-owned property to the extent directed or approved by the Contracting Officer.

(11) Repairs, maintenance, and inspection of contractor-owned property used in connection with the performance of this contract, including reasonable standby facilities, which are due to ordinary wear and tear from use and the action of the elements, provided such maintenance and repairs keep the property in efficient operating condition and do not add to its permanent value or appreciably prolong its extended useful life; and major repairs (including replacement) to such property, except that such major repairs when directly chargeable to the contract shall be subject to approval by the Contracting Officer.

(12) Reproduction and art work, including such models and mockups as may be approved by the Contracting Officer.

(13) Structures and facilities of a temporary nature as approved by the Contracting Officer.

(14) Membership in trade, business, and professional organizations, except that such memberships when directly chargeable to the contract shall be subject to approval by the Contracting Officer.

(15) Subcontracts, purchase orders, and procurements from contractor-controlled sources, subject to approvals required by other provisions of this contract.

(16) Subscriptions to trade, business, technical, and professional periodicals, except that such subscriptions when directly chargeable to the contract shall be subject to approval by the Contracting Officer.

(17) Taxes, fees, and charges levied by public agencies which the contractor is required by law to pay, except those which are expressly made unallowable under other provisions of this contract.

(18) Utility services, including electricity, gas, water, steam, and sewerage.

(19) (Reserved).

(20) (Reserved).

(21) Indemnification of the Pension Benefit Guaranty Corporation pursuant to the Employee Retirement Income Security Act of 1974, in accordance with §9-15.205-6, notwithstanding the provisions of §9-50.704-16(e)(15)(i).

(e) Examples of items of unallowable costs. The following examples of items of costs are unallowable under this contract to the extent indicated:

(1) Advertising, except (i) help-wanted advertising, and (ii) other advertising (such as costs of participation in exhibits) approved by the Contracting Officer as clearly in furtherance of work performed under the contract.

(2) Bad debts (including expenses of collection) and provisions for bad debts not arising out of the performance of this contract.

(3) Bonuses and similar compensation under any other name, which (i) are not pursuant to an agreement between the contractor and employee prior to the rendering of the services or an established plan consistently followed by the contractor, (ii) are in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder, or (iii) provide total compensation to an employee in excess of reasonable compensation for the services rendered.

(4) Commissions, bonuses, and fees (under whatever name) in connection with obtaining or negotiating for a Government contract or a modification thereto, except when paid to bona fide employees or bona fide established selling organizations maintained by the contractor for the purpose of obtaining Government business.

(5) Provisions for contingency reserves: provisions for (except provisions for reserves under a self-insurance program to the extent that the type, coverage, rates, and premiums would be allowable if commercial insurance were purchased to cover the same risk, as approved by the Contracting Officer).

(6) Contributions and donations.

(7) Depreciation in excess of that calculated by application of methods approved for use by the Internal Revenue Services under the Internal Revenue Code of 1954, as amended, including the straight-line, declining balance (using a rate not exceeding twice the rate which would have been used had the depreciation been computed under the straight-line method) or sum-of-the-years digits method, on the basis of expected useful life, to the cost of acquisition of the related fixed assets less estimated salvage or residual value at the end of the expected useful life. Amortization or depreciation of unrealized appreciation of values of assets or of assets fully amortized or depreciated on the contractor's books of account is unallowable.

(8) Dividend provisions or payments and, in the case of sole proprietors and partners, distribution of profits.

(9) Entertainment costs, except the costs of such recreational activities for on-site employees as may be approved by the Contracting Officer or provided for elsewhere in this contract.

(10) Fines and penalties, including assessed interest, resulting from violations of, or failure of the contractor to comply with, Federal, State, or local laws, or regulations, except when incurred in accordance with written approval of the Contracting Officer or as a result of compliance with the provisions of this contract.

(11) Government-furnished property, except to the extent that cash payment therefor is required pursuant to procedures of DOE applicable to transfers of such property to the contractor from others.

(12) Insurance (including any provision of a self-insurance reserve) on any person where the contractor under the insurance policy is the beneficiary directly or indirectly, and insurance against loss of or damage to Government property as defined in Clause __________ .

(13) Interest, however represented (except interest incurred in compliance with the clause entitled "State and Local Taxes"), bond discounts and expenses, and costs of financing and refinancing operations.

(14) Legal, accounting, and consulting services and related costs incurred in connection with the preparation of prospectuses, preparation and issuance of stock rights, organization or reorganization, prosecution or defense of antitrust suits, prosecution of claims against the United States, contesting actions or proposed actions of the United States, and prosecution or defense of patent infringement litigation.

(15) Losses (including litigation expenses, Counsel fees, and settlements) on, or arising from the sale, exchange, or abandonment of capital assets, including investments; losses on other contracts, including the contractor's contributed portion under cost-sharing contracts; losses in connection with price reduction to and discount purchases by employees and others from any source; and losses where

such losses or expenses:

(i) Are compensated for by insurance or otherwise, or which would have been compensated by insurance required by law or by written direction of the Contracting Officer but which the contractor failed to procure or maintain through its own fault or negligence, or which could have been covered by permissible insurance in keeping with ordinary business practice but which the contractor failed to secure or maintain;

(ii) Result from willful misconduct or lack of good faith on the part of any of the contractor's directors, corporate officers, or a supervising representative of the contractor, as defined in Clause __________ of this contract;

(iii) Represent liabilities to third persons for which the contractor has expressly accepted responsibility under other terms of this contract.

(16) Precontract costs, except as expressly made allowable under other provisions in this contract.

(17) Reconversion, alteration, restoration, or rehabilitation of the contractor's facilities, except as expressly provided elsewhere in this contract.

(18) (Reserved).

(19) Selling costs, except to the extent they are determined to be reasonable and to be allocable to the contract. Allocability of selling costs to the contract will be determined in the light of reasonable benefit to the agency program arising from such activities as technical, consulting, demonstration, and other services performed for such purposes as applying or adapting the contractor's product for agency use.

(20) Storage of records pertaining to this contract after completion of operations under this contract irrespective of contractual or statutory requirement of the preservation of records.

(21) Taxes, fees, and charges in connection with financing, refinancing, or refunding operations, including the listing of securities on exchanges; taxes which are paid contrary to the clause entitled "State and local taxes;" Federal taxes on net income and excess profits; special assessments on land which represent capital improvement; and taxes on accumulated funding deficiencies of, or prohibited transactions involving, employee deferred compensation plans pursuant to Section 4971 or Section 4975 of the Internal Revenue Code of 1954, as amended, respectively.

(22) Salary or other compensation (and expenses related thereto) of any individual employed under this contract as a consultant or in another comparable employment capacity, who is an employee of another organization and concurrently performing work on a full-time annual basis for that organization under a cost-type contract with DOE, except to the extent that cash payment therefor is required pursuant to the provisions of this contract or procedures of DOE applicable to the borrowing of such an individual from another cost-type contractor.

(23) First-class air travel in excess of the cost of less than first-class air accommodations, except when less than first-class accommodations are not reasonably available to meet necessary mission requirements, such as, where less than first-class accommodations would:

(i) Require circuitous routing,

(ii) Require travel during unreasonable hours,

(iii) Greatly increase the duration of the flight,

(iv) Result in additional costs which would offset the transportation savings, or

(v) Offer accommodations which are not reasonably adequate for the medical needs of the traveler.

(24) Late premium payment charges related to employee deferred compensation plan insurance, in accordance with §9-15.205-16.

(25) Bidding expenses and costs of proposals.

(26) Central and branch office expenses of the contractor, except as specifically set forth in the contract.

(27) Travel expenses of officers, partners, proprietors, executives, administrative heads, and other employees of the contractor's central office or

branch office organization concerned with the general management, supervision, and conduct of the contractor's business as a whole, except to the extent that particular travel is in connection with the contract and approved by the Contracting Officer.

(28) Research and development costs, unless specifically provided for elsewhere in this contract.

(29) Facilities capital cost of money (CAS-414).

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§9-50.704-17 Obligation of funds.

(a) Obligation of funds. The amount presently obligated by the Government with respect to this contract is ______________________ dollars ($________). Such amount may be increased unilaterally by DOE by written notice to the contractor and may be increased or decreased by written agreement of the parties (whether or not by formal modification of this contract). Estimated revenues and receipts from others for work and services to be performed under this contract are not included in the amount obligated with respect to this contract. Such revenues and receipts, to the extent actually received by the contractor, shall be available and used for the payment of allowable costs as provided in the article entitled "Payments and Advances." Nothing in this paragraph (a) is to be construed as authorizing the contractor to exceed limitations stated in financial plans established by DOE and furnished to the contractor from time to time under this contract.

(b) Limitation on payment by the Government. Except as otherwise provided in this contract and except for costs which may be incurred by the contractor pursuant to the article entitled "Termination," or costs of claims allowable under the contract accruing after completion or termination and not released by the contractor at the time of financial settlement of the contract in accordance with the article entitled "Payments and advances," payment by the Government under this contract on account of allowable costs shall not, in the aggregate, exceed the amount obligated with respect to this contract, less the contractor's fixed fee. Unless expressly negated in this contract, payment on account of those costs excepted in the preceding sentence which are in excess of the amount obligated with respect to this contract shall be subject to the availability of (1) revenues and receipts deposited to the Government's account as provided in the article entitled "Payments and advances," and (2) other funds which DOE may legally use for such purpose, provided DOE will use its best efforts to obtain the appropriation of funds for this purpose if not otherwise available.

(c) Notices—Contractor excused from further performance. The contractor shall notify DOE in writing whenever the unexpended balance of funds (including revenues and receipts) available under paragraph (a) above, plus the contractor's best estimate of revenues and receipts to be received during the _________ day period hereinafter specified, is in the contractor's best judgment sufficient to continue contract operations at the programed rate for only _________ days and to cover the contractor's unpaid fixed fee, and outstanding commitments and liabilities on account of costs allowable under the contract at the end of such period. Whenever the unexpended balance of funds (including revenues and receipts) available under paragraph (a) above, less the amount of the contractor's fixed fee then earned but not paid, is in the contractor's best judgment either sufficient only to liquidate outstanding commitments and liabilities on account of costs allowable under this contract or is equal to zero, the contractor shall immediately notify DOE and shall make no further commitments or expenditures (except to liquidate existing commitments and liabilities), and, unless the parties otherwise agree, the contractor shall be excused from further performance (except such performance as may become necessary in connection with termination by the Government) and the performance of all work hereunder will be deemed to have been terminated for the convenience of the Government in accordance with the provisions of the article entitled "Termination."

(d) Financial plans; cost and commitment limitations. In addition to the limitations provided for elsewhere in this contract, DOE may, through financial plans or other directives issued to the contractor, establish controls on the costs to be incurred and commitments to be made in the performance of the contract work. Such plans and instruction may be amended or supplemented from time to time by DOE. The contractor hereby agrees to comply with the specific limitations (ceilings) on costs and commitments set forth in such plans and directives, to use its best efforts to comply with the other requirements of such plans and directives, and to promptly notify DOE in writing, whenever it has reason to believe the authorized financial levels of costs and commitments will be exceeded or substantially underrun.

NOTE: This paragraph (d) may be omitted in contracts which expressly or otherwise provided a contractual basis for equivalent controls in a separate article.

(e) Government's right to terminate not affected. The giving of any notice under this article shall not be construed to waive or impair any right of the Government to terminate the contract under the provisions of the article entitled "Termination."

OMB CONTROL NO.: 1901—0021.

§9-50.704-18 Payments and advances.

(a) Installments of fixed-fee. Ninety percent (90%) of the fixed-fee shall become due and payable in periodic installments in amounts based on the proportion of the work then completed, as determined by the Contracting Officer, and the balance upon completion and acceptance of all work under this contract.

NOTE A: For operating contracts use: "The fixed-fee provided for in Clause____________shall be paid in equal monthly installments as it accrues."

NOTE B: Where a separate fixed-fee is provided for a separate item of work, this subparagraph should be modified to permit payment of the entire fixed-fee upon completion of that item.

(b) Payments on Account of Allowable Costs. The Contracting Officer and the contractor shall agree as to the extent to which payment for allowable costs or payments for other items specifically approved in writing by the Contracting Officer shall be made from advances of Government funds. When pension contributions are paid by the contractor to the retirement fund less frequently than quarterly, accrued costs therefor shall be excluded from costs for payment purposes until such costs are paid. If pension contributions are paid on a quarterly or more frequent basis, accruals therefor may be included in costs for payment purposes, provided that they are paid to the fund within 30 days after the close of the period covered. If payments are not made to the fund within such 30-day period, pension contribution costs shall be excluded from cost for payment purposes until payment has been made.

(c) Special bank account—use. All advances of Government funds shall be withdrawn pursuant to a letter of credit in favor of the contractor or, in the option of the Government, shall be made by check payable to the contractor, and shall be deposited only in the Special bank account referred to in the Agreement for Special Bank Account, which is attached hereto and incorporated into this contract as an appendix. The contractor shall likewise deposit in the Special Bank Account any other revenues received by the contractor in connection with the work under this contract. No part of the funds in the Special bank account shall be (1) mingled with any funds of the contractor or (2) used for a purpose other than that of making payments for costs allowable under this contract or payments for other items specifically approved in writing by the Contracting Officer. If the Contracting Officer shall at any time determine that the balance on such bank account exceeds the contractor's current needs, the contractor shall promptly make such disposition of the excess as the Contracting Officer may direct.

NOTE: For Special bank account agreement, see §9-50.704-19.

(d) Title to funds advanced. Title to the unexpended balance of any funds advanced and of any bank account established pursuant to this clause shall remain in the Government and be superior to any claim or lien of the bank of deposit or others. It is understood that an advance to the contractor hereunder is not a loan to the contractor, and will not require the payment of interest by the contractor, and that the contractor acquires no right, title or interest in or to such advance other than the right to make expenditures therefrom, as provided in this clause.

(e) Review and approval of costs incurred. The contractor shall prepare and submit annually as of September 30, a voucher for the total of net expenditures accrued (i.e., net costs incurred) for the period covered by the voucher, and DOE, after audit and appropriate adjustment, will approve such voucher. This approval by DOE will constitute an acknowledgment by DOE that the net costs incurred are allowable under the contract and that they have been recorded in the accounts maintained by the contractor in accordance with DOE accounting policies, but will not relieve the contractor of responsibility for DOE's assets in its care, for appropriate subsequent adjustments, or for errors later becoming known to DOE.

NOTE: This paragraph (e) should be omitted in contracts with nonintegrated contractors.

(f) Financial settlement. The Government shall promptly pay to the contractor the unpaid balance of allowable costs and fixed fee upon termination of the work, expiration of the term of the contract, or completion of the work and its acceptance by the Government after (1) compliance by the contractor with DOE's patent clearance requirements, and (2) the furnishing by the contractor of:

(i) An assignment of the contractor's rights to any refunds, rebates, allowances, accounts receivable, or other credits applicable to allowable costs under the contract;

(ii) A closing financial statement;

(iii) The accounting for Government-owned property required by the clause entitled "Property;" and

(iv) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract,subject only to the following exceptions:

(A) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the contractor;

(B) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the contractor to third parties arising out of the performance of this contract; provided that such claims are not known to the contractor on the date of the execution of the release; and provided further that the contractor gives notice of such claims in writing to the Contracting Officer not more than six (6) years after the date of the release or the date of any notice to the contractor that the Government is prepared to make final payment, whichever is earlier; and

(C) Claims for reimbursement of costs (other than expenses of the contractor by reason of any indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the contractor under the provisions of this contract relating to patents.

In arriving at the amount due the contractor under this clause, there shall be deducted, (1) any claim which the Government may have against the contractor in connection with this contract, and (2) deductions due under the terms of this contract, and not otherwise recovered by or credited to the Government. The unliquidated balance of the Special bank account may be applied to the amount due and any balance shall be returned to the Government forthwith.

(g) Claims. Claims for credit against funds advanced for payment shall be accompanied by such supporting documents and justification as the Contracting Officer shall prescribe.

(h) Discounts. The contractor shall take and afford the Government the advantage of all known and available cash and trade discounts, rebates, allowances, credits, salvage, and commissions unless the Contracting Officer finds that action is not in the best interest of the Government.

(i) Revenues. All revenues other than the contractor's fixed fee or fees, if any, accruing to the contractor in connection with the work under this contract shall be Government property and shall be deposited in the Special bank account to be available for payment of allowable cost under this contract.

(j) Direct payment of charges. The Government reserves the right, upon ten days' written notice from the Contracting Officer to the contractor, to pay directly to the persons concerned, all amounts due which otherwise would be allowable under this contract. Any payment so made shall discharge the Government of all liability to the contractor therefor.

OMB CONTROL NO.: 1901—0021.

§9-50.704-19 Special bank account agreement.

Agreement entered into this _________ day of _________ , 19___, between the United States of America (hereinafter called the Government), represented herein by the Department of Energy (hereinafter called the "DOE"), , hereinafter called the "Contractor", a corporation under the laws of the State of _________ , and _________ , hereinafter called the "Bank", a banking corporation under the laws of _________ , located at _________ .

RECITALS

(a) Under date of _________, 19___, DOE and the Contractor entered into Contract(s) No. _________ , or a Supplemental Agreement thereto, providing for the making of advances of Government funds to the Contractor. Copy of such advance provisions has been furnished to the Bank.

(b) DOE requires that amounts advanced to the Contractor under said contract or Supplemental Agreement be deposited in a Special bank account or accounts with a bank designated by the Treasury Department as a depositary and financial agent of the Government (Section 10 of the Act of June 11, 1942, 56 Stat. 356; 12 U.S.C. 265), separate from any of the Contractor's general or other funds; and, the Bank being such a bank, the parties are agreeable to so depositing said amounts with the Bank.

(c) This Special bank account shall be designated "__________________ __________________ (Name of Contractor), __________________ (Contract Number), Department of Energy Special Bank Account."

COVENANTS

In consideration of the foregoing, and for other good and valuable considerations, it is agreed that,

(1) The Government shall have title to the credit balance in said account to secure the return of all advances made to the contractor, which title shall be superior to any lien or claim of the Bank or others with respect to such account.

(2) The Bank will be bound by the provisions of said contract or contracts relating to the deposit and withdrawal of funds in the above Special bank account, but shall not be responsible for the application of funds properly withdrawn from said account. After receipt by the Bank of written directions from the Contracting Officer, or from the duly authorized representative of the Contracting Officer, the Bank shall act thereon and shall be under no liability to any party hereto for any action taken in accordance with the said written directions.

(3) The Government, or its authorized representatives, shall have access to the books and records maintained by the Bank with respect to such Special Bank Account at all reasonable times and for all reasonable purposes, including, without limitation, the inspection or copying of such books and records and any and all memoranda, checks, correspondence, or documents pertaining thereto. Except as agreed upon by the Government and the Bank, all books and records pertaining to the Special Bank Account in the possession of the Bank relating to the Special Bank Account agreement shall be preserved by the Bank for a period of three (3) years after final payment under the contract to which the Special Bank Account agreement pertains or otherwise disposed of in such manners as may be agreed upon by the Government and the Bank.

(4) In the event of the service of any writ of attachment, levy of execution, or commencement of garnishment proceedings with respect to the Special bank account, the Bank will promptly notify the Head of the Procuring Activity, DOE.

In witness whereof the parties hereto have caused this Agreement to be executed, as of the day and year first above written.

____

(Signatures and Official Titles)

OMB CONTROL NO.: 1901—0021.

§9-50.704-20 Payments (cost-type contracts where funds are not advanced by DOE).

(a) Payments on account of allowable costs. Once each month (or at more frequent intervals, if approved by the Contracting Officer) the contractor may submit to the Contracting Officer, in such form and reasonable detail as he may require, an invoice or voucher supported by a statement of cost incurred by the contractor in the performance of this contract and claimed to constitute allowable costs. When pension contributions are paid by the contractor to the retirement fund less frequently than quarterly, accrued costs therefor shall be excluded from indirect costs for payment purposes until such costs are paid. If pension contributions are paid on a quarterly or more frequent basis, accruals therefor may be included in indirect costs for payment purposes provided that they are paid to the fund within 30 days after the close of the period covered. If payments are not made to the fund within such 30-day period, pension contribution costs shall be excluded from indirect cost for payment purposes until payment has been made. Promptly after receipt of each invoice or voucher, the Government shall, subject to the provisions of (c) below, make payment thereon as approved by the Contracting Officer.

NOTE: For supply-type contracts make last sentence read "make payment to the extent of 90% thereon."

(b) Payments on account of fixed fee. The fixed fee shall become due and payable in periodic installments in amounts based on the proportion of the work then completed as determined by the Contracting Officer. In making such periodic payments, there shall be retained (10 or 15) percent from each payment which retained amounts shall be paid upon completion and acceptance of all work under this contract; provided, however, that the Contracting Officer may, at any time the amount of the retained fixed fee equals one hundred thousand dollars ($100,000) make payments of any of the remaining periodic installaments of the fixed fee in full.

(c) Audit adjustments. At any time or times prior to settlement under this contract, the Contracting Officer may have invoices or vouchers and statements of cost audited. Each payment theretofore made shall be subject to reduction for amounts included in the related invoice or voucher which are found by the Contracting Officer on the basis of such audit, not to constitute allowable cost. Any payment may be reduced for overpayments or increased for underpayments on preceding invoices or vouchers.

(d) Completion voucher. On receipt and approval of the invoice or voucher designated by the contractor as the "completion invoice" or "completion voucher" and upon compliance by the contractor with all the provisions of this contract (including without limitation, the provisions relating to patents and provisions of (f) below) the Government shall promptly pay to the contractor any balance of allowable cost, and any part of the fixed fee which has been withheld pursuant to (b) above or otherwise not paid to the contractor. The completion invoice or voucher shall be submitted by the contractor promptly following completion of the work under this contract but in no event later than one (1) year (unless within the year, the Contracting Officer grants a further specific period of time) from the date of such completion.

(e) Applicable credits. The contractor agrees that any refunds, rebates, credits or other amounts (including any interest thereon) accruing to or received by the contractor or any assignee under this contract, shall be paid by the contractor to the Government, to the extent that they are properly allocable to costs for which the contractor has been reimbursed by the Government under this contract. Reasonable expenses incurred by the contractor for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable costs hereunder when approved by the Contracting Officer.

(f) Financial settlement. Prior to final payment under this contract, the contractor and each assignee under this contract whose assignment is in effect at the time of final payment under this contract shall execute and deliver:

(1) An assignment to the Government in form and substance satisfactory to the Contracting Officer of refunds, rebates, credits, or other amounts (including any interest thereon) properly allocable to costs for which the contractor has been reimbursed by the Government under this contract; and

(2) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions

(i) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the contractor;

(ii) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the contractor to third parties arising out of performance of this contract, provided, that such claims are not known to the contractor on the date of the execution of the release; and provided further, that the contractor gives notice of such claims in writing to the Contracting Officer not more than six years after the date of the release or the date of any notice to the contractor that the Government is prepared to make final payment, whichever is earlier; and

(iii) Claims for reimbursement of costs (other than expenses of the contractor by reason of any indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the contractor under the provisions of this contract relating to patents.

OMB CONTROL NO.: 1901—0021.

§9-50.704-21 Property.

(a) Furnishing of Government property. The Government reserves the right to furnish any property or services required for the performance of the work under this contract.

(b) Title to property. Except as otherwise provided by the Contracting Officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any item of such property. The contractor shall make such dispostion of rejected items as the Contracting Officer shall direct. Title to other property, the cost of which is reimbursable to the contractor under this contract, shall pass to and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract, or (iii) reimbursement of the cost thereof by the Government, whichever first occurs. Property furnished by the Government and property purchased or furnished by the contractor, title to which vests in the Government, under this paragraph are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property or any part thereof, be or become a fixture or lose its identity as personality by reason of affixation to any realty.

(c) Identification. To the extent directed by the Contracting Officer, the contractor shall identify government property coming into the contractor's possession or custody, by marking and segregating in such a way, satisfactory to the Contracting Officer, as shall indicate its ownership by the Government.

(d) Disposition. The contractor shall make such dispostion of Government property which has come into the possession or custody of the contractor under this contract as the Contracting Officer shall direct. When authorized in writing by the Contracting Officer during the progress of the work or upon completion or termination of this contract, the contractor may, upon such terms and conditions as the Contracting Officer may approve, sell, or exchange such property, or acquire such property at a price agreed upon by the Contracting Officer and the contractor as the fair value thereof. The amount received by the contractor as the result of any disposition, or the agreed fair value of any such property acquired by the contractor, shall be applied in reduction of cost allowable under this contract or shall be otherwise credited to account of the Government, as the Contracting Officer may direct. Upon completion of the work or the termination of this contract, the contractor shall render an accounting, as prescribed by the Contracting Officer, of all government property which had come into the possession or custody of the contractor under this contract.

(e) Protection of government property—Classified Materials. The contractor shall take all reasonable precautions, as directed by the Contracting Officer, or in the absence of such directions in accordance with sound industrial practice, to safeguard and protect government property in the contractor's possession or custody. Special measures shall be taken by the contractor in the protection of and accounting for any classified or special materials involved in the performance of this contract, in accordance with the regulations and requirements of DOE.

(f) Risk of loss of government property. The contractor shall not be liable for loss or destruction of or damage to government property in the contractor's possession unless such loss, destruction or damage results from willful misconduct or lack of good faith on the part of the contractor's managerial personnel, or unless such loss, destruction or damage results from a failure on the part of the contractor's managerial personnel to take all reasonable steps to comply with any appropriate written directives of the Contracting Officer to safeguard such property under paragraph (e) hereof. The term "contractor's managerial personnel" as used herein means the contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of (1) all or substantially all of the contractor's business; or (2) all or substantially all of the contractor's operation at any one plant or separate location at which this contract is being performed; or (3) a separate and complete major industrial operation in connection with the performance of this contract; or (4) a separate and complete major construction, alteration or repair operation in connection with performance of this contract.

(g) Steps to be taken in event of loss. Upon the happening of any loss or destruction of or damage to government property in the possession or custody of the contractor, the contractor shall immediately inform the Contracting Officer of the occasion and extent thereof, shall take all reasonable steps to protect the property remaining, and shall repair or replace the lost, destroyed, or damaged property, if and as directed by the Contracting Officer, but shall take no action prejudicial to the right of the Government to recover therefor and shall furnish to the Government, on request, all reasonable assistance in obtaining recovery.

(h) Government property for Government use only. Government property shall be used only for the performance of this contract.

(i) Property Management. The contractor shall maintain and administer a property management system, subject to the approval of the Contracting Officer, of accounting for and control, utilization, maintenance, repair, protection and preservation of Government property in his possession under the contract. The contractor's property management system shall be maintained and administered in accordance with sound business practice, and in accordance with Department of Energy Property Management Regulations and such directives or instructions which the Contracting Officer may from time to time prescribe.

OMB CONTROL NO.: 1901—0021.

§9-50.704-22 Contractor procurement.

(a) DOE reserves the right at any time to require that the contractor submit for approval any or all procurements under this contract. The contractor shall not procure any item whose purchase is expressly prohibited by the written direction of DOE and shall use such special and directed procurement sources as may be expressly required by DOE. The contractor shall (note A) provide information concerning procurement methods, practices, and procedures used or proposed to be used and shall use methods, practices, and procedures which are acceptable to DOE. Procurement arrangements under this contract (note B) shall not relieve the contractor of any obligation under this contract (including, among other things, the obligation properly to supervise, administer, and coordinate the work of subcontractors) and shall be in such form and contain such provisions as are required by this contract or as DOE may prescribe.

(b) In addition to, and without derogation of any rights under paragraph (a) of this section and any other provision in this contract, the contractor shall require subcontractors to furnish cost or pricing data, and shall include in such subcontracts the appropriate clause set forth in §9-50.704-24 except as otherwise directed or approved by DOE.

(c) Procurement or transfer of equipment, materials, supplies, or services from a contractor-controlled source (any division or other organizational component of the prime contractor (exclusive of the contracting component) and any subsidiary or affiliate of the contractor under a common control) shall be considered a procurement for the purposes of this article.

NOTE A: When appropriate, the words, "if required by the Contracting Officer," may be inserted here.

NOTE B: When appropriate, the words "shall be made in the name of the contractor, shall not bind nor purport to bind the Government" may be inserted here.

OMB CONTROL NO.: 1901—0021.

§9-50.704-23 Taxes.

See §9-50.1103-3.

OMB CONTROL NO.: 1901—0021.

§9-50.704-24 Subcontractor cost or pricing data.

(a) The following clause shall be inserted in all subcontracts under the prime contracts referred to in DOE-PR §9-3.807-3 where such subcontracts are over $100,000 and in all modifications over $100,000 to such subcontracts, even though the original amount of the subcontract is $100,000 or less:

CERTIFIED COST OR PRICING DATA

(1) The subcontractor shall require under the situations described in (2) below, unless exempted under the exceptions set forth in (3) below, each sub-subcontractor under this subcontract to submit cost or pricing data and to certify that, to the best of his knowledge and belief, such cost or pricing data are accurate, complete and current.

(2) Except as provided in (3) below, certified cost or pricing data shall be submitted prior to (i) the award of each sub-subcontract, the price of which is expected to exceed $100,000, and (ii) the negotiation of the price of each change or modification to a sub-subcontract under this subcontract for which the price adjustment is expected to exceed $100,000.

(3) Certified cost or pricing data need not be furnished pursuant to this paragraph (a) where (i) the subcontractor has not been required to furnish cost or pricing data; or (ii) the price adjustment is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or the prices are set by law or regulation; and the subcontractor states in writing the basis for applying this exception.

(4) In submitting the cost or pricing data, the sub-subcontractor shall use the form of certificate set forth in paragraph (b) below and shall certify that the data are accurate, complete, and current. Such certificate and data (actual or identified, as provided in the certificate prescribed below) shall be submitted by sub-subcontractors to the next higher-tier sub-subcontractor or the subcontractor, as applicable, for retention.

(b) The certificates required by this clause shall be in the form set forth below.

SUBCONTRACTOR'S CERTIFICATE OF CURRENT COST OR PRICING DATA

This is to verify that, to the best of my knowledge and belief, cost or pricing data submitted in writing, or specificaly identified in writing if actual submission of the data is impracticable (see FPR 1-3.807-3(h)(2), to the contractor in support of ______________ are accurate, complete, and current as of ________ .

Firm ______________________________

Name ______________________________

Title ______________________________

(c) For purposes of verifying that certified cost or pricing data submitted in conjunction with the negotiation of this subcontract or any subcontract change or other modification involving an amount in excess of $100,000 were accurate, complete, and current, DOE shall, until the expiration of 3 years from the date of final payment under this subcontract, have the right to examine those books, records, documents, papers, and other supporting data which involve transactions related to this subcontract or which will permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

(d) If the original price of this subcontract exceeds $100,000 or the price of any change or other modification to this subcontract is expected to exceed $100,000, the subcontractor agrees to furnish the contractor certified cost or pricing data, using the certificate set forth in paragraph (b) above, unless the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(e) The requirement for submission of certified cost or pricing data with respect to any change or other modification does not apply to any sub-subcontract change or other modification, at any tier, where the subcontract is firm fixed-price or fixed-price with escalation unless such change or other modification results from a change or other modification to the subcontract, nor does it apply to a sub-subcontract change or modification, at any tier, where the subcontract is not firm fixed-price or fixed-price with escalation unless the price for such change or other modification becomes reimbursable under the subcontract.

(f) The subcontractor agrees to insert paragraph (c) without change and the substance of paragraphs (a), (b), (d), (e), and (f) of this clause in each sub-subcontract hereunder in excess of $100,000 and in each sub-subcontract of $100,000 or less, at the time of making a change or other modification thereto in excess of $100,000.

(g) If the prime contractor determines that any price, including profit or fee, negotiated in connection with this subcontract or any cost reimbursable under this subcontract was increased by any significant sums because the subcontractor, or any sub-subcontractor pursuant to this clause or any sub-subcontract clause herein required, furnished incomplete or inaccurate cost or pricing data or data not current as certified in the subcontractor's certificate of current cost or pricing data, then such price or cost shall be reduced accordingly and the contract shall be modified in writing to reflect such reduction.

(h) Failure of the contractor and the subcontractor to agree on any of the matters in paragraph (g) above shall be a dispute concerning a question of fact within the meaning of the disputes clause of this subcontract.

NOTE: Since the subcontract is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain sub-subcontracts, it is expected that the subcontractor may wish to include a clause in each such sub-subcontract requiring the sub-subcontractor to appropriately indemnify the subcontractor. It is also expected that any sub-subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by his lower-tier sub-subcontractors.

(a) This clause may also be used for subcontracts of $100,000 or less for which a certificate of cost or pricing data is obtained in accordance with FPR 1-3.807-3(g), and, if so used, the $100,000 amount stated in the clause should be appropriately modified.

(b) The Head of a Procuring Activity, for contracts estimated to be within the limits of delegated authority, may, without power of redelegation, approve the waiver cited in FPR 1-3.814-3(c).

OMB CONTROL NO.: 1901—0021.

§9-50.704-25 Workmanship and materials.

(a) Grade of workmanship and materials. Unless otherwise directed by the Contracting Officer or expressly provided for by specifications issued under this contract:

(1) All workmanship shall be first class; and

(2) All articles, equipment and materials incorporated in the work are to be:

(i) New and of the most suitable grade of their respective kinds for the purpose;

(ii) In accordance with any applicable drawings and specifications; and

(iii) Installed to the satisfaction and with the approval of the Contracting Officer.

Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the Contracting Officer shall decide the question of equality.

(b) Samples and test results. If the Contracting Officer so requires, the contractor shall submit for approval samples of or test results on any materials proposed to be incorporated in the work before making any commitment for the purchase of such materials.

OMB CONTROL NO.: 1901—0021.

§9-50.704-26 Nuclear facility safety applicability.

The clause set forth herein shall be included in all contracts and subcontracts for, and be made applicable to, work to be performed at or involving the construction, startup, operation, and decommissioning of DOE-owned nuclear facilities deemed to be exempt from nuclear regulatory licensing requirements. Any deviation in substance affecting the meaning, intent, or basic principles of this clause must be referred to the Senior Procurement Official, Headquarters, for approval. Minor changes in wording which may become necessary in negotiations may be approved by the Contracting Officer for this action after consultation with the General Counsel.

NUCLEAR SAFETY

(a) The activities under this contract include the operation of nuclear facilities. The contractor recognizes that such operation involves the risk of a radiological incident which, while the chances are remote, could adversely affect the public health and safety as well as the environment. Therefore, the contractor will exercise a degree of care commensurate with the risk involved.

(b) The contractor shall comply with all applicable regulations of DOE concerning nuclear safety and with those requirements (including reporting requirements and instructions) of DOE concerning nuclear safety of which it is notified in writing by the Contracting Officer.

(c) Prior to the initial startup of any nuclear facility under this contract and prior to any subsequent startup following a change which represents a significant deviation from the procedures, equipment, or analyses described in the safety analysis reports or other hazards summary reports for that facility, the contractor shall:

(1) Prepare a safety analysis report including technical specifications and detailed plans and procedures designed to assure the safe operations and maintenance of the facility.

(2) Establish nuclear safety control procedures to be used within the contractor's organization to insure competent independent review and internal approval of the safety analysis report and the detailed plans and procedures specified in (1) above.

(3) Submit to the Contracting Officer for his approval such procedures relating to nuclear safety as may be designated by him.

(4) Carry out a program of initial training and periodic requalification designed to assure that all personnel who will be engaged in nuclear operations or maintenance understand the approved plans and procedures for nuclear safety and are qualified to perform their assigned functions; and

(5) Obtain the approval of the Contracting Officer prior to start-up of the facility.

(d) In the operation and maintenance of any nuclear facility under this contract, the contractor shall:

(1) Use all reasonable efforts to assure that all operational and maintenance activities are performed by qualified and adequately trained personnel, and except as otherwise agreed in writing, are conducted under the supervision of personnel who are qualified and authorized to evaluate any emergency condition and take prompt effective action with respect thereto.

(2) Operate the facility within the technical specifications which are approved by the Contracting Officer.

(3) Follow strictly the procedures relating to nuclear safety approved by the Contracting Officer in (c)(3) above, and submit to the Contracting Officer for his approval, any proposed changes in such procedures.

(4) Establish an auditable, well-defined, internal safety review and inspection system approved by the Contracting Officer (including review of inspection reports by competent technical personnel) that will: (i) provide frequent and periodic checks of facility performance and of the qualifications and training of operating and maintenance personnel, and (ii) provide for investigation of any unusual or unpredicted conditions that might affect safe operation.

(5) Report promptly to the Contracting Officer any change in the physical condition of the facility or its operating characteristics that might, in the judgment of the contractor, affect the safe operation of the facility.

(6) Terminate operations at the facility immediately whenever so instructed by the Contracting Officer, or whenever, in the judgment of the contractor, the risk of a radiological incident endangering persons or property warrants such action.

(7) Prepare, in cooperation with other services and facilities available at the site and with the approval of the Contracting Officer, a plan for minimizing the effects of a radiological incident upon the health and safety of all persons on the site; cooperate with the Contracting Officer in his preparation of a plan to protect the public off-site; instruct its personnel as to their participation in such plans and any personal risk to such personnel that may be involved; and participate in such practice exercises as may be desirable to assure the effectiveness of such plans.

(8) At an appropriate time as determined by the Contracting Officer, prepare and submit to the Contracting Officer for his approval, shutdown, decommissioning, decontamination and property management plans leading to orderly and safe program disposition of the nuclear facility and any associated nuclear wastes or other hazardous material.

(9) In the event that the contractor fails to comply with said standards and requirements of DOE, the contracting officer may, without prejudice to any other legal or contractual rights of DOE, issue an order stopping all or any part of the work; thereafter a start order for resumption of the work may be issued at the discretion of the contracting officer. The contractor shall make no claim for an extension of time or for compensation or damages by reason of or in connection with such work stoppage.

OMB CONTROL NO.: 1901—0021.

§9-50.704-27 Consultant or other comparable employment services of contractor employees.

(a) The following clause shall be included in all cost-reimbursement type contracts identified in §9-50.1213-2(c).

> The contractor shall require all employees who are employed full-time (an individual who performs work under the cost-type contract on a full-time annual basis) or part-time (50 percent or more of regular annual compensation received under terms of a contract with DOE) on the contract work to disclose to the contractor all consultant or other comparable employment services which the employees propose to undertake for others. The contractor shall transmit to the Contracting Officer all information obtained from such disclosures. The contractor will require any employee who will be employed full-time on the contract to agree, as a condition of his participation in such work, that he will not perform consultant or other comparable employment services for another DOE contractor under its contract with DOE, except with the prior approval of the contractor.

(b) The following clause shall be included in all contracts identified in §9-50.1213-2(d).

> The contractor shall require all employees who are employed full-time (an individual who performs work under the cost-type contract on a full-time annual basis) or part-time (50 percent or more of regular annual compensation received under terms of a contract with DOE) on the contract work to disclose to the contractor all consultant or other comparable employment services which the employees propose to undertake for others. The contractor shall transmit to the Contracting Officer all information obtained from such disclosures. The contractor will require any employee who will be employed full-time on the contract work

to agree, as a condition of his participation in such work, that he will not perform consultant or other comparable employment services for another DOE contractor in the same or related energy field for another organization except with the prior approval of the contractor. If the contractor believes, with respect to any employee who is employed full-time on the contract work, that any proposed consultant or other comparable employment service for an organization in the atomic energy field other than a DOE cost-type contractor may involve: (1) A rate of remuneration significantly in excess of the employee's regular rate of remuneration; (2) a significant question concerning possible conflict with DOE's policies regarding conduct of employees of DOE's contractors; (3) the contractor's responsibility to report fully and promptly to DOE all significant research and development information; or (4) the patent provisions of the contractor's contract with DOE, the contractor shall obtain the prior approval of the Contracting Officer for such consultant or other comparable employment service.

OMB CONTROL NO.: 1901—0021.

§9-50.704-28 Assignment.

Neither this contract nor any interest therein nor claim thereunder shall be assigned or transferred by the contractor except as expressly authorized in writing by the Contracting Officer.

OMB CONTROL NO.: 1901—0021.

§9-50.704-29 Permits.

Except as otherwise directed by the Contracting Officer, the contractor shall procure all necessary permits or licenses and abide by all applicable laws, regulations, and ordinances of the United States and of the state, territory, and political subdivision in which the work under this contract is performed.

OMB CONTROL NO.: 1901—0021.

§9-50.704-30 Notice of labor disputes.

Whenever an actual or potential labor dispute is delaying or threatening the performance of the work, the contractor shall immediately notify the Contracting Officer in writing. Such notice shall include all relevant information concerning the dispute and its background.

OMB CONTROL NO.: 1901—0021.

§9-50.704-31 Litigation and claims.

(a) Initiation of litigation. The contractor may, with the prior written authorization of the Contracting Officer, and shall, upon the request of the Government, initiate litigation against third parties, including proceedings before administrative agencies, in connection with this contract. The contractor shall proceed with such litigation in good faith and as directed from time to time by the Contracting Officer.

(b) Defense and settlement of claims. The contractor shall give the Contracting Officer immediate notice in writing (1) of any action, including any proceeding before an administrative agency, filed against the contractor arising out of the performance of this contract, and (2) of any claim against the contractor, the cost and expense of which is allowable under the clause entitled "Allowable Costs." Except as otherwise directed by the Contracting Officer, in writing, the contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the contractor with respect to such action or claim. To the extent not in conflict with any applicable policy of insurance, the contractor may with the Contracting Officer's approval, settle any such action or claim, shall effect at the Contracting Officer's request an assignment and subrogation in favor of the Government of all the contractor's rights and claims (except those against the Government) arising out of any such action or claim against the contractor, and if required by the Contracting Officer, shall authorize representatives of the Government to settle or defend any such action or claim and to represent the contractor in, or to take charge of, any action. If the settlement or defense of an action or claim against the contractor is undertaken by the Government, the contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the contractor is not covered by a policy of insurance, the contractor shall, with the approval of the Contracting Officer, proceed with the defense of the action in good faith and in such event the defense of the action shall be at the expense of the Government, provided, however, that the Government shall not be liable for such expense to the extent that it would have been compensated for by insurance which was required by law or by the written direction of the Contracting Officer, but which the contractor failed to secure through its own fault or negligence.

OMB CONTROL NO.: 1901—0021.

§9-50.704-32 Required bonds and insurance—exclusive of Government property (cost-type contracts).

The contractor shall procure and maintain such bonds and insurance as are required by law or by the written direction of the Contracting Officer subject to the conditions set forth in §9-7.204-5. The terms and conditions of any such bonds and insurance shall conform to the directions of the Contracting Officer. In view of the provisions of the article entitled "Property," the contractor shall not procure or maintain for its own protection any insurance covering loss or destruction of or damage to Government-owned property.

OMB CONTROL NO.: 1901—0021.

§9-50.704-33 Priorities, allocations, and allotments.

The contractor shall follow the provisions of Defense Materials System Regulation 1 and all other applicable regulations and orders of the Domestic and International Business Administration, Department of Commerce in obtaining controlled materials and other products and materials needed to fill this order.

OMB CONTROL NO.: 1901—0021.

§9-50.704-34 Soviet-bloc controls (unclassified research contracts with educational institutions).

In connection with the contract activities, the contractor agrees to comply with the requirements set forth in Attachment _________ of this contract relating to the countries listed therein. From time to time, by written notice to the contractor, DOE shall have the right to change the listing of countries in Attachment _________ upon a determination by DOE that such change is in conformance with national policy. The contractor shall have the right to terminate its performance under this contract upon at least sixty days' prior written notice to DOE if the contractor determines that it is unable, without substantially interfering with its policies as an educational institution or without adversely affecting its performance, to continue performance of the work under this contract as a result of a change in Attachment _________ made by DOE pursuant to the preceding sentence. If the contractor elects to terminate performance, the provisions of this contract respecting termination for the convenience of the Government shall apply.

OMB CONTROL NO.: 1901—0021.

§9-50.704-35 Controls in the national interest (unclassified contracts with educational institutions).

The contractor agrees to comply with the requirements of DOE specified in Attachment _________ to this contract, and to such other DOE requirements of the same general nature as the parties may agree to from time to time; these requirements relate to unclassified work, and they shall not be construed to limit or affect in any way the contractor's obligation to conform to all security regulations and requirements of DOE pertaining to classified work.

OMB CONTROL NO.: 1901—0021.

§ 9-50.704-36 (Reserved)

§9-50.704-37 Statement of work (cost-type contracts).

(a) While it is not feasible to set forth standard language which would fit every cost-type contract situation, language for this clause must be designed to describe clearly the work being undertaken; the controls, as appropriate, to be exercised by DOE over the performance of that work; and the relationship contemplated between the parties.

(b) This clause shall also include the following language with respect to subcontracting performance of the work described pursuant to (a) above. The contractor shall, when directed by DOE and may, but only when authorized by DOE, enter into subcontracts for the performance of any part of the work under this article.

(c) In operating contracts when the contractor is expected to perform no Davis-Bacon work with his own forces, the special clause in §9-50.1804-3 shall be included in this clause.

OMB CONTROL NO.: 1901—0021.

§9-50.704-38 Special clause for operating contracts.

See §9-50.1804-2.

§9-50.704-41 Preservation of individual occupational radiation exposure records.

> Individual occupational radiation exposure records generated in the performance of work under this contract shall be subject to inspection by DOE and shall be preserved by the contractor until disposal is authorized by DOE or at the option of the contractor delivered to DOE upon completion or termination of the contract. If the contractor exercises the foregoing option, title to such records shall vest in DOE upon delivery.

NOTE: The foregoing clause shall be included in all contracts containing DOE standard clause §9-50.704-2.

OMB CONTROL NO.: 1901—0021.

§9-50.704-42 Key personnel.

> It having been determined that the employees whose names appear (below) (in Appendix _________), or persons approved by the Contracting Officer as persons of substantially equal abilities and qualifications, are necessary for the successful performance of this contract, the contractor agrees to assign such employees or persons to the performance of the work under this contract and shall not reassign or remove any of them without the consent of the Contracting Officer. Whenever, for any reason, one or more of the aforementioned employees is unavailable for assignment for work under the contract, the contractor shall, with the approval of the Contracting Officer, replace such employee with an employee of substantially equal abilities and qualifications.

OMB CONTROL NO.: 1901—0021.

§9-50.704-43 Other contracts.

> The Government may undertake or award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and Government employees and carefully fit its own work to such additional work as may be directed by the Contracting Officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by Government employees.

OMB CONTROL NO.: 1901—0021.

§9-50.704-44 Termination article for CPFF architect-engineer contracts.

See §9-8.751.

§9-50.704-45 Termination article for operating contracts.

See §9-50.801.

§9-50.704-46 Rights in technical data - facility.

See §9-9.2

§9-50.704-47 Classified inventions.

See §9-9.106.

§ 9-50.704-48 Cost and schedule control systems.

Certain DOE projects are of such significance and magnitude that responsible management calls for enhanced visibility of contractor cost and schedule performance as well as more formalized data to document their progress and aid in decisions regarding their continuation. Any contract with a total estimated cost in excess of $50 million shall require full implementation of the DOE cost and Schedule Control Systems Criteria. Selected projects between $2 million and $50 million may benefit from modified implementation of such a control system. In those instances where the DOE Cost and Schedule Control Systems Criteria are to be utilized, the Contractor shall follow the current Cost and Schedule Control Systems Implementation Guide, and the following clause, appropriately modified to identify the parties, shall be included:

Cost and Schedule Control Systems

(a) In the performance of this contract, the contractor shall establish, maintain, and use cost and schedule control systems (management control systems) meeting the criteria set forth in the contract and as described in detail in DOE/CR-0015, "Cost and Schedule Control Systems Criteria for Contract Performance Measurement—Implementation Guide," annexed hereto and hereinafter referred to as the "Guide." Prior to acceptance by the Contracting Officer and within ——— calendar days after contract award, the contractor shall be prepared to demonstrate systems operation to the Government to verify that the proposed systems meet the designated criteria. As a part of the review procedures, the contractor shall furnish the Government a description of the cost and schedule control systems applicable to this contract in such form and detail as indicated by the Guide, or as required by the Contracting Officer. The contractor agrees to provide access to all pertinent records, data, and plans as requested by representatives of the Government for the conduct of systems review.

(b) The description of the management control systems accepted by the Contracting Officer, identified by title and date, shall be referenced in the contract. Such systems shall be maintained and used by the contractor in the performance of this contract.

(c) Contractor changes to the reviewed systems shall be submitted for review and approval as required by the Contracting Officer. When Contracting Officer approval is required, the Contracting Officer shall advise the contractor of the acceptability of such changes within sixty (60) days after receipt from the contractor. When systems existing at the time of contract award do not comply with the designated criteria, adjustments necessary to assure compliance will be made at no change in contract price or fee.

(d) The contractor agrees to provide access to all pertinent records and data requested by the Contracting Officer, or duly authorized representative, for the purpose of permitting Government surveillance to insure continuing application of the accepted systems to this contract. Deviations from the systems description identified during contract performance shall be corrected as directed by the Contracting Officer.

(e) The contractor shall require that each selected subcontractor, as mutually agreed to between the Government and the contractor and as set forth in the schedule of this contract, meet the criteria for cost and schedule control systems as set forth in subcontract and shall incorporate in all such subcontracts adequate provisions for review and surveillance of subcontractor's systems to be carried out by the prime contractor, or by the Government when requested by either the prime or subcontractor.

Subpart 9-50.8 Termination of Contracts

§9-50.800 Scope and applicability of subpart.

The policies and procedures of FPR Part 1-8 and Part 9-8 shall be applied to the termination and settlement of subcontracts by operating and on-site service contractors.

§9-50.801 Clause.

The clause set forth in FPR 1-8.702 is not required to be used in operating and on-site contracts. However, all operating and on-site contracts, regardless of whether they are for production, research and development, or services, should contain an appropriate termination clause approved by Counsel. The following is suggested for use in operating contracts:

> (a) This contract shall continue until __________ unless sooner terminated in accordance with the provisions which follow:
>
> (1) The performance of work under this contract may be terminated by the Government in whole, or from time to time in part, (i) whenever the contractor shall default in performance, and shall fail to cure the fault or failure within such period as the Contracting Officer may allow after receipt from the Contracting Officer of a notice specifying the fault or failure, or (ii) whenever, for any reason, the Contracting Officer shall determine any such termination is for the best interest of the Government. Termination of the work hereunder shall be effected by delivery of a notice of termination specifying whether termination is for default of the contractor or for the convenience of the Government, the extent to which performance of work under the contract shall be terminated, and the date upon which such termination shall become effective. Any such termination shall be without prejudice to any claim which either party may have against the other. If, after notice of termination under the provisions of (a)(1) (i) above, it is determined for any reason that the contractor was not in default, such notice of default shall be deemed to have been issued pursuant to (a)(1)(ii) above, and the rights and obligations of the parties hereto shall in such event be governed accordingly.
>
> (2) Upon receipt of notice of termination, in accordance with (1) above, the contractor shall, to the extent directed in writing by the Contracting Officer, discontinue the terminated work and the placing of orders for materials, facilities, supplies, and services in connection therewith, and shall proceed, if, and to the extent required by the Contracting Officer, to cancel promptly and settle with the approval of the Contracting Officer, existing orders, subcontracts, and commitments insofar as such orders, subcontracts, and commitments pertain to this contract.
>
> (b) Upon the termination of this contract, full and complete settlement of all claims of the contractor and of DOE arising out of this contract shall be made as follows:
>
> (1) The Government shall have the right in its discretion to assume sole responsibility for any or all obligations, commitments, and claims that the contractor may have undertaken or incurred, the cost of which are allowable in accordance with the provisions of this contract; and the contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government any rights and benefits the contractor may have under or in connection with such obligations, commitments, or claims.
>
> (2) The Government shall treat as allowable costs all expenditures made in accordance with and allowable under the article entitled "Allowable Costs and Fixed Fee," not previously so allowed or otherwise credited for work performed prior to the effective date of termination, together with expenditures as may be incurred for a reasonable time thereafter with the approval of, or as directed by, the Contracting Officer.
>
> (3) The Government shall treat as allowable costs, to the extent not included in (b)(2) above, the costs of settling and paying claims arising out of the termination of work under orders, subcontracts, and commitments as provided in (a)(2) above.
>
> (4) The Government shall treat as allowable costs the reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the

termination of the contract and for the termination and settlement of orders and subcontracts thereunder, together with such further expenditures made by the contractor after the date of termination for the protection or disposition of Government property as are approved or required by the Contracting Officer; provided, however, that if the termination is for default of the contractor, there shall not be included any amount for preparation of the contractor's settlement proposal.

(5) If performance of work under this contract is terminated in whole by the Government, the fixed fee of the contractor shall be prorated to and including the effective date of such termination. In addition, if the termination is for the convenience of the Government, the contractor shall be paid a fixed fee in an amount to be agreed upon as compensation for its services in closing out the work under this contract after the effective date of such termination. The additional fixed fee is to be negotiated as soon as practicable after service of notice of termination, shall take into account the estimate of the cost of the services and managerial effort to be rendered under this article after the effective date of termination, and shall be provided for in a supplement or amendment to this contract prior to final settlement hereunder. Pending agreement as to the amount of such fee, the contractor shall diligently proceed with the performance of the services required under this article. No additional fee will be paid if the contract is terminated due to the default of the contractor. In the event of a partial termination by the Government, an equitable adjustment shall be made in the fixed fee if such termination results in a material decrease in the level of the contractor's management effort. Any failure to agree on the right to or the amount of any adjustment shall be deemed a dispute within the purview of the article hereof entitled "Disputes."

(6) The obligation of the Government to make any of the payments required by this article or any other provisions of this contract shall be subject to any unsettled claims in connection with this contract which the Government may have against the contractor.

(c) Prior to final settlement, the contractor shall furnish a release as required in the article entitled "Payments and Advances" hereof and such accounting for Government-owned property as may be required by the Contracting Officer: provided however, that unless the Contracting Officer requires an inventory, the maintenance and disposition of records of Government-owned property in accordance with the article entitled "Accounts, Records and Inspection" hereof, shall be accepted by the Contracting Officer as full compliance with all requirements of this contract pertaining to an accounting for such property.

Subpart 9-50.9 Patents, Data, and Copyrights

§9-50.900 Scope of subpart.

This subpart sets forth policies, procedures, and contract clauses with respect to inventions made, conceived, or utilized in the course of or under any contracts, or other arrangements entered into, with or for the benefit of DOE. In addition, this subpart sets forth DOE's policies, procedures, and contract clauses with respect to the acquisition and use of technical data and copyrights in contracts or subcontracts entered into with or for the benefit of the Government.

§9-50.901 General policy.

With respect to patents, it is noted that subpart 9-9.1 applies hereto, with the exception that the short form Patent Rights clause in §9-9.107-6 will not be used in contracts calling for the operation of Government-owned facilities. Also, the provisions of §9-9.109-6(h) pertaining to "waivers to educational institutions" do not apply to this subpart. In the case of Subpart 9-9.2, all of the material contained therein is also applicable hereto, either with respect to prime contracts or subcontracts thereunder.

§9-50.902 Negotiations and deviations.

Contracting Officers shall contact the field Patent Counsel assisting their procuring activity, or the Assistant General Counsel for Patents, for assistance to the Contracting Officer in selecting, negotiating, or approving appropriate patent, data, and copyright clauses in accordance with the procedures as set forth in §9-9.107-4 (k) and §9-9.202-5.

Subpart 9-50.10 Bonds and Insurance

§9-50.1000 Scope of subpart.

Policies and procedures of FPR Part 1-10, shall be applied to procurements by operating and on-site service contractors, except that the provisions of FPR 1-10.104-1 and 1-10.105-1 shall be applied only to construction subcontracts.

§9-50.1001 Bid guarantees.

A bid guarantee may be required for a lump sum or a unit price construction subcontract under an operating contract when the subcontract is entered into under procedures similar to formal advertising.

§9-50.1002 Performance bonds.

Performance bonds shall not be furnished at Government expense in connection with DOE operating and on-site contracts and cost-reimbursement type subcontracts thereunder, including construction.

§9-50.1002-1 Construction contracts (Lump Sum and Unit Price).

A performance bond on Standard Form 25 (modified to name the operating or on-site service contractor as well as the United States of America as obligees) shall be required for all lump sum and unit price construction subcontracts in excess of $25,000 where the subcontracts are under operating or on-site service contracts (or under cost-reimbursement type subcontracts under those operating or on-site service contracts). The penal amounts should be as set forth in FPR 1-10.104-1(b).

§9-50.1002-2 Other than construction contracts.

Situations in addition to those listed in FPR 1-10.104-2(b) which may warrant requiring a performance bond are:

(a) Where doubt exists as to the financial or technical ability of all possible suppliers.

(b) Where the contractor's talent is overly concentrated in a few key personnel whose illness or departure could seriously impair the contractor's ability to perform the proposed work.

(c) Where other commitments of the contractor might delay performance.

(d) Where performance of the proposed work might disrupt other operations of the contractor and impair its overall efficiency; or

(e) Where the item being manufactured is a component for another article and is required by a particular date in order to avoid delay in delivery of the end product.

§9-50.1003 Payment bonds.

Payment bonds shall not be furnished at Government expense in connection with operating and on-site contracts and cost-reimbursement type subcontracts, including construction.

§9-50.1003-1 Construction contracts (Lump Sum and Unit Price).

A payment bond on Standard Form 25A modified to name the operating contractor (as well as the United States of America as obligees) shall be required for all lump sum and unit price construction subcontracts in excess of $25,000 where the subcontracts are under operating and on-site service contracts (or under cost-reimbursement type subcontracts under operating and on-site contracts). The penal amounts should be as set forth in FPR 1-10.105-1(b).

§9-50.1003-2 Other than construction contracts.

Determinations that it is in the best interest of the Government to require payment bonds in connection with other than construction contracts may be made by the Contracting Officer on individual procurements, subject to the approval of the Head of the Procuring Activity. In the case of either advertised or negotiated procurements, whenever the Contracting Officer has reason to believe that work under a proposed contract might be delayed because of the concern of subcontractors or suppliers over the credit standing of a potential prime contractor, he should consider the advisability of requiring a payment bond.

§9-50.1004 Execution and administration of bonds.

(a) Bid bonds. Prior to award of a contract, the Contracting Officer shall obtain review of the bid bond furnished with the successful bid as to legal form and sufficiency and as to acceptability of the surety. Prior to award of a construction subcontract, the Contracting Officer or, with his approval, the operating or on-site contractor shall obtain review of the bid bond furnished with the successful bid as to legal form and sufficiency and as to acceptability of the surety and adequacy of the bond.

(b) Performance and payment bonds. The Contracting Officer shall obtain review of such bonds as to legal form and sufficiency and as to adequacy. Prior to award of a construction subcontract, the Contracting Officer or, with his approval, the operating or on-site contractor (or cost-reimbursement type subcontractor under an operating contractor), shall obtain review of such bonds as to legal form and sufficiency and as to acceptability of the surety and adequacy of the bond.

§9-50.1005 Contract article—bonds.

The contract article pertaining to bonds is set forth in §9-50.704-32.

§9-50.1006 Corporate cosureties.

More than one corporate surety may be accepted as surety upon any recognizance, stipulation, bond, or undertaking in connection with either construction or other contracts, provided that in no case, will the liability of any such cosurety exceed the maximum penal sum in which the corporate surety is qualified to any one obligation. On bonds covering contracts other than construction contracts, where the amount of the bond is greater than the limitation of the corporate surety, the latter may reinsure with a corporation on the acceptable list of corporate sureties having the required underwriting capacity. Reinsurance agreements are not acceptable in connection with construction contracts. Corporate cosureties need not obligate themselves for the full amount of the bond. Each corporate surety may, by setting forth the limit of its liability in the bond as a definite and specified sum, limit such liability. The cosureties must, however, bind themselves "jointly and severally" for the purpose of allowing a joint action or actions against any or all of them.

§9-50.1007 Partnerships as sureties.

A partnership or other unincorporated association, as such, shall not be accepted as a surety. The individual members of the partnership or association may, of course, qualify as sureties, provided they meet the requirements set forth in FPR 1-10.203. Individual members of a partnership or association shall not, however, be acceptable as sureties on bonds under which the partnership or association, or any co-partner or member thereof, is the principal obligor.

§9-50.1008 Substitution or replacement of a surety.

In case of financial embarrassment, failure, or other disqualifying cause on the part of a surety under a bond, the Contracting Officer shall require the substitution of a satisfactory new surety.

§9-50.1009 Contract article—insurance.

The contract article pertaining to insurance is set forth in §9-50.704.32.

§9-50.1010 Indemnification of DOE contractors.

The provisions of Subpart 9-10.50, Indemnification of DOE contractors, apply to operating and on-site service contractors in accordance with §9-10.5001.

Subpart 9-50.11 Federal, State and Local Taxes

§9-50.1101 Exemptions from Federal excise taxes.

§9-50.1101-1 Supplies and services for the exclusive use of the United States.

(a) The exemption respecting taxes on communication services or facilities has been held to extend to such services when furnished to DOE operating and on-site service contractors who pay for such services or facilities from advances made to them by DOE under their contracts.

(b) Additional exemptions: Where it is considered that a request for an additional exemption would be justified, a recommendation that such a request be made should be forwarded to the Controller.

(c) Exemption certificates: Where tax exemption certificates are required in connection with the foregoing taxes, the Head of the Procuring Activity will supply standard Government forms on request.

§9-50.1102 State and local taxes.

§9-50.1102-1 Policy.

It is the DOE policy to secure those immunities or exemptions from State and local taxes to which it is entitled under the Federal Constitution or State laws. In carrying out this policy, Heads of Procuring Activities shall:

(a) Take all necessary steps to preclude payment of any taxes for which any of the foregoing immunities or exemptions are available. Advice of Counsel should be sought as to the availability of such immunities or exemptions;

(b) Procure directly and furnish to contractors as Government furnished property, equipment, material, or services when, in the opinion of the Head of the Procuring Activity:

(1) Such direct procurement will result in substantial savings to the Government, taking into consideration any additional administrative costs;

(2) Such direct procurement will not have a substantial adverse effect on the relationship between DOE and its contractor; and

(3) Such direct procurement will not have a substantial adverse effect on the DOE program or schedules.

§9-50.1103 Contract clauses.

§9-50.1103-1 Cost-reimbursement type contracts.

Contracting Officers should include an appropriate clause in operating and on-site service contracts (and cost-type subcontracts where the higher-tier contracts and subcontracts are cost-type) which would require that the contractor take certain actions with regard to nonpayment, payment, protest, or other treatment of specific taxes.

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§9-50.1103-2 Purchase orders and subcontracts.

Contracting Officers should assure that tax matters are appropriately treated in their review and approval of an Operating Contractor's procurement system and in their review and approval of individual procurements by such contractor. An appropriate tax article should be included in all fixed-price purchase orders and subcontracts and purchase orders contain provisions covering all tax matters which may require special consideration.

OMB CONTROL NO.: 1901—0021.

§9-50.1103-3 Clause.

The following clause is suggested for use in operating contracts:

STATE AND LOCAL TAXES

(a) The contractor agrees to notify the Contracting Officer of any State or local tax, fee, or charge levied or purported to be levied on or collected from the contractor with respect to the contract work, any transaction thereunder, or property in the custody or control of the contractor and constituting an allowable item of cost if due and payable, but which the contractor has reason to believe, or the Contracting Officer has advised the contractor, is or may be inapplicable or invalid;[1] and the contractor further agrees to refrain from paying any such tax, fee, or charge unless authorized in writing by the Contracting Officer. Any State or local tax, fee, or charge paid with the approval of the Contracting Officer or on the basis of advice from the Contracting Officer that such tax, fee, or charge is applicable and valid, and which would otherwise be an allowable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax, fee, or charge was in fact inapplicable or invalid.

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[1] Requirement for notice may be broadened to include all State and local taxes which may be claimed as allowable costs when considered to be appropriate.

(b) The contractor agrees to take such action as may be required or approved by the Contracting Officer to cause any State or local tax, fee, or charge which would be an allowable cost to be paid under protest; and to take such action as may be required or approved by the Contracting Officer to seek recovery of any payments made, including assignment to the Government or its designee of all rights to an abatement or refund thereof, and granting permission for the Government to join with the contractor in any proceedings for the recovery thereof or to sue for recovery in the name of the contractor. If the Contracting Officer directs the contractor to institute litigation to enjoin the collection of or to recover payment of any such tax, fee, or charge referred to above, or if a claim or suit is filed against the contractor for a tax, fee, or charge it has refrained from paying in accordance with this article, the procedures and requirements of the article entitled "Litigation and Claims" shall apply and the costs and expenses incurred by the contractor shall be allowable items of cost, as provided in this contract, together with the amount of any judgment rendered against the contractor.

(c) The Government shall hold the contractor harmless from penalties and interest incurred through compliance with this article. All recoveries or credits in respect of the foregoing taxes, fees, and charges (including interest) shall inure to and be for the sole benefit of the Government.

OMB CONTROL NO.: 1901—0021.

Subpart 9-50.12 Labor Relations

§9-50.1200 Scope of subpart.

(a) This part implements and supplements FPR Part 1-12.

(b) The provisions referenced below pertain to procurement by operating and on-site service contractors and subcontractors thereunder.

§9-50.1201 Basic labor policies.

§9-50.1201-1 General.

(a) The policies and procedures stated in FPR Subpart 1-12.1 are recommended for guidance of Federal agencies and provide that problems arising out of contractor labor relations shall be handled in accordance with agency procedures. Except as provided herein, Contracting Officers shall, in appropriate circumstances, follow the guidance in FPR Subpart 1-12.1.

(b) Contracting Officers shall apply the principles and policies set forth in this part 9-50.12 in lieu of or in modification of FPR 1-12.101 to contractors responsible for the management/operation of Government-owned and/or controlled sites and facilities.

§9-50.1201-2 Labor relations (contractor personnel management and labor relations).

The extent of Government ownership of the nation's energy plant and materials, and the overriding concerns of national defense and security, impose special conditions on personnel and labor relations in the energy program, namely, continuity of vital operations at DOE installations must be assured; DOE must retain absolute authority on all questions of security; DOE reviews labor expenses under operating and on-site contracts as a part of its responsibility for assuring judicious expenditure of public funds. It is the intent of DOE, that personnel and labor policies throughout the energy program should reflect the best experience of American industry in aiming to achieve the type of stable labor-management relationships essential to the proper development of the energy program. The following enunciates the principles upon which the DOE policy is based:

(a) Employment standards.

(1) Contractors are expected to bring experienced, proven personnel from their private operations to staff key positions on the contract work and to recruit other well-qualified personnel as needed. Such personnel should be employed and treated during employment without discrimination by reason of race, color, religion, sex, or national origin. Contractors shall take affirmative action to achieve these objectives.

(2) The job qualifications and suitability of prospective employees should be established by the contractor prior to employment by careful personnel investigations. Where a security clearance will be required, the applicant's suitability must be established before a request is made to DOE for a security clearance.

(3) The contractor is responsible for maintaining satisfactory standards of employee qualifications, performance, conduct, and business ethics under its own personnel policies.

(b) Security.

On all matters of security at its installations, DOE retains absolute authority and neither the security rules nor their administration are matters for collective bargaining between management and labor. Insofar as DOE security regulations affect the collective bargaining process, the security policies and regulations will be made known to both parties. To the fullest extent feasible, DOE will consult with representatives of management and labor in formulating security rules and regulations that affect the collective bargaining process.

(c) Wages, salaries, and employee benefits.

(1) Wages, salaries, and employee benefits shall be administered in a manner designated to adapt normal industry or university practices and conditions to the contract work and to provide for appropriate review by DOE. Area practices, valid patterns, and well-established commercial or academic practices of the contractors, as appropriate, form the criteria for the establishment and adjustment of compensation schedules.

(2) The aspects of wages, hours, and working conditions which are the substance of collective bargaining in normal organized industries will be left to the orderly processes of negotiation and agreement between DOE contractor managements and employee representatives with maximum possible freedom from Government interference.

(d) Employee relations.

The handling of employee relations on contract work, including such matters as the conduct and discipline of the work force and the handling of employee grievances, is part of the normal management responsibility of the contractor.

(e) Collective bargaining.

(1) DOE review of collective bargaining practices will be premised on the view that management's trusteeship for the operation of the Government facilities includes the duty to adopt practices which are fundamental to the friendly adjustment of disputes, and which experience has shown promote orderly collective bargaining relationships. Practices inconsistent with this view may be objected to, if not found to be otherwise clearly warranted.

(2) In line with the policy of assuring continuity of operation of vital facilities, all collective bargaining agreements at Government-owned energy installations should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resort to strike, lockout, or other interruption to normal operations. For this purpose, each collective bargaining agreement should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operations for the term of the agreement.

(3) DOE expects its contractors and the unions representing contractor employees to cooperate fully with the Federal Mediation and Conciliation Service.

(f) Personnel training.

DOE encourages and supports personnel training programs aimed at improving work efficiency or developing needed skills which are not otherwise obtainable. DOE also encourages participation by its construction contractors in building trades apprenticeship programs under Federal, State, and local apprenticeship standards.

(g) Working conditions.

Accident, fire, health, and occupational hazards associated with DOE activities will be held to a practical minimum level and controlled in the interest of maintenance of health and prevention of accidents. To this end, contractors are required to maintain comprehensive continuous preventive and protective programs appropriate to the particular activities throughout all operations subject to DOE control. Appropriate financial protection in case of occupational disability will be provided employees on DOE projects.

§9-50.1201-3 Overtime, extra-pay shifts, and multi-shift work (Refer to §9-12.102).

§9-50.1201-4 Retention of payroll and associated records.

Under certain contracts for the management and operation of DOE facilities, for the construction of major facilities, and for necessary miscellaneous construction incidental to the function of these facilities, the title to payroll and associated records is in the Government and such records are disposed of in accordance with DOE directions. For such contracts, the Solicitor of Labor has granted a tolerance from the Department of Labor Regulations to omit from the prescribed labor clauses the requirement for the retention of payrolls and associated records for a period of three years after completion of the contract. Under this tolerance, the records retention requirements for all labor clauses in the contract and the Fair Labor Standards Act is satisfied by disposal of such records in accordance with DOE directives.

§9-50.1202 Convict labor.

The provisions of FPR Subpart 1-12.2 apply to procurement by operating and on-site contractors.

§9-50.1203 Contract Work Hours and Safety Standards Act (other than construction contracts).

The requirements of FPR Subpart 1-12.3 apply to procurement by operating and on-site service contractors to the same extent and under the same conditions such requirements apply to direct procurement. Paragraph (c) of the clause in FPR 1-12.303 should be revised to provide for the withholding of moneys from the subcontractor by the Prime Contractor as directed by the Contracting Officer.

§9-50.1204 Walsh-Healey Public Contracts Act.

(a) The requirements of FPR Subpart 1-12.6 and this section apply to procurement by operating and on-site service contractors to the same extent and under the same conditions such requirements apply to direct procurement.

(b) Because DOE has safety and health standards compatible with those of 41 CFR 50-204, the Labor Department has agreed to accept DOE's program for inspection and evaluation of compliance, in lieu of establishing its own program of inspection and evaluation to the extent the Walsh-Healey safety and health standards are applicable to operations conducted for DOE at Government-owned and/or controlled sites or facilities.

§9-50.1205 Equal opportunity in employment.

This subpart implements FPR 1-12.8.

§9-50.1205-1 Duties of the agency.

(a) The Director, Office of Federal Contract Compliance Programs of the Department of Labor has been delegated authority and responsibility for carrying out the requirements of Executive Order 11246. In conjunction with the delegation, Contracting Officers shall be familiar with existing and any updated provisions of 41 CFR, Chapter 60 and assist the Department of Labor in its compliance responsibilities. DOE Contracting Officers will include the applicable EEO and AAP (Affirmative Action Program) requirements in their solicitations and obtain the applicable reports of compliance from OFCCP (when required), prior to awarding of contracts. The provisions of 41 CFR, Chapter 60 are applicable to all existing and prospective DOE contractors including construction contractors performing work at Government-owned or supported facilities and sites.

(b) The Office of Federal Contract Compliance requires that requests for pre-award clearances be directed to OFCCP Regional Office in which the contractor's facility is (to be) located. If the compliance agency finds the contractor in compliance, the Contracting Officer will be notified. Findings of non-compliance can only be communicated to the Contracting Officer by the Headquarters' Director or OFCCP or his designee. The appropriate Regional Office will provide the appropriate contract point in cases of non-compliance. The Director, Office of Industrial Relations (DOE HQ), when requested, will provide assistance to Contracting Officers resolving non-compliance issues by providing assistance in obtaining a final decision from the Office of Federal Contract Compliance Programs.

§9-50.1205-2 Pre-award requirements—nonexempt contracts and subcontracts.

(a) Nonconstruction contracts. Prior to the award of a non-construction, nonexempt contract of $1 million or more, the Contracting Officer shall determine that, as outlined in FPR 1-12.805-5(d), the Prime Contractor and each of its known first-tier subcontractors which will be awarded subcontracts of $1 million or more, are in compliance with the equal opportunity clause pursuant to 41 CFR 60-1. In the event that the prospective contractor or subcontractor has not held a contract containing the equal opportunity clause, the Contracting Officer shall determine that the prospective contractor appears able to conform to the requirements of the EEO clause. The Contracting Officer shall request the OFCCP Regional Office to make this determination, which is required by FPR 1-12.805-5.

(b) Construction contracts.

(1) Construction contracts, including cost sharing contracts, are subject to Office of Federal Contract Compliance Programs (OFCCP) requirements outlined in 41 CFR 60-4, "Construction Contractors - Affirmative Action Requirements."

(i) Contracting Officers shall include the notice in 41 CFR 60-4.2(d) and the specifications in 41 CFR 60-4.3 in all solicitations for offers and bids on all Federal construction contracts or subcontracts in excess of $10,000. Contracting Officers shall require the inclusion of such notice and specifications as a condition of any Federal contract or subcontract.

(ii) Lists of areas for which OFCCP has designated specific affirmative action requirements are available through the Directorate of Procurement and Contracts Management or the Director of OFCCP upon request. Contracting Officers should assure that this list and copies of pertinent orders are made available to all concerned DOE procurement offices and to DOE contractors and construction subcontractors for work to be performed in the specific geographical areas.

(2) Failure to submit an unqualified bid or proposal. Attempt to limit in any major respect the equal opportunity requirements included in an invitation for bid or request for proposal for a construction contract shall constitute grounds for a determination that the offeror does not qualify as a responsible offeror and for rejection of the bid or proposal. In the case of procurement actions by DOE prime contractors, this determination shall be made only with the approval of the DOE Contracting Officer.

§9-50.1205-3 Referral list.

The Office of Federal Contract Compliance Programs (OFCCP) maintains a list of firms for which special attention is required before entering into contracts. The Senior Procurement Official, Headquarters, or designee is responsible for the maintenance and distribution of such lists and will provide updated copies to Contracting Officers.

§9-50.1206 Affirmative action compliance programs (AACP).

(a) Whenever a nonexempt, nonconstruction contractor has 50 or more employees and a contract of $50,000 or more, or a nonexempt construction contractor has a regular work force of 50 or more and the contract is in the amount of $50,000 or more, the contractor shall develop a written affirmative action compliance program for each of its establishments, unless the contract is exempt as per FPR 1-12.804. Each prime contractor and subcontractor shall require each subcontractor who has 50 or more employees and a subcontract of $50,000 or more to develop a written AACP for each of its establishments, unless the subcontract is exempt as per FPR 1-12.704. Elements of a satisfactory AACP are outlined in 41 CFR 60-2.

(b) Within 120 days from the start of the contract or subcontract, each contractor or subcontractor shall maintain a copy of separate AACPs for each establishment at each local office responsible for personnel matters of such establishment. An AACP shall become part of the human resource and development plans for each establishment of those contractors who operate DOE-owned or leased facilities. Results of such programs shall be compiled periodically, as required by OFCCP, and the program shall be updated annually. This information shall be made available to representatives of DOE or Director, Office of Federal Contract Compliance Programs, upon request.

§9-50.1207 Service Contract Act.

(a) The Service Contract Act of 1965 is not applicable to contracts for the operation and management of DOE facilities. However, subcontracts awarded by contractors operating and managing DOE facilities are subject to the Act to the same extent and under the same conditions as contracts made directly by DOE, under which the contractor is acting on the Government's behalf.

(b) Subcontracts awarded by contractors operating and managing DOE facilities shall include the applicable clause in FPR 1-12.904 with such modifications as would otherwise be appropriate had this clause been included in the prime contract, including the modification necessary if §9-50.1201-4 applies.

§9-50.1208 Listing of employment openings.

The provisions of FPR Subpart 1-12.11 apply to procurement by operating and on-site service contractors.

§9-50.1209 Williams Steiger Occupational Safety and Health Act of 1970.

The requirements of FPR Subpart 1-12.12 apply to procurements made by operating and on-site service contractors for work to be performed offsite.

§9-50.1210 Special considerations affecting construction laborers and mechanics.

§9-50.1210-1 General.

(a) As collective bargaining arrangements exist generally throughout the construction industry, the wages, hours and working conditions followed for construction laborers and mechanics normally will result from collective bargaining between management and labor. It is important that practices contributing to harmonious labor-management relations prevail throughout the DOE program. All participants in the DOE program, including employees and their unions, have a special and continuing obligation to do their part in accomplishing a stable, efficient construction operation under adequate and reasonable conditions.

(b) In some areas, DOE construction is a minor part of local construction activity, while in other areas DOE construction may at times overshadow local construction. Normally, there will be a number of contractors and subcontractors, both cost-type and lump-sum, engaged simultaneously on a single large DOE project. It is important that adequate coordination exist among all such contractors in order that similar conditions are provided for all construction employees, in a given classification, at a particular location.

(c) The problem of establishing appropriate conditions for the large projects is complicated by the essential requirement that initial conditions be clearly identified and fixed prior to recruitment of the work force. This factor involves applicability of all pertinent Federal statutes, including the Davis-Bacon Act and the Labor Management Relations Act of 1947, as amended (29 U.S.C. 141 et seq.).

§9-50.1210-2 Steps preliminary to the staffing of new cost-type projects.

Preliminary to the actual recruitment of workers, it is important that sufficient data be accumulated by the field office concerned to reflect area practices accurately. These data should cover in detail the pattern of bargaining in the area; the proportion of the work force employed by employer parties to collective bargaining agreements in relation to the total construction work force; the terms of local area agreements; the extent of conformance with such agreements and any accepted interpretations of them; and a description of practices which may have developed outside of the local agreements. These data will furnish the basis for decision contemplated in §9-50.1210-3 and §9-50.1210-4. Where the data indicate local agreements are adequate for the contemplated work, there may still be gaps that need to be filled by additional understandings to attain the desired stability of conditions. The data obtained in the initial survey will also be used in connection with the original Davis-Bacon predetermination.

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§9-50.1210-3 Role of project contractor management in collective bargaining.

DOE expects contractor management engaged in the negotiation and/or administration of collective bargaining agreements to assume responsibility for assuring conditions which are consistent with the judicious expenditure of public funds, attracting and retaining the skills needed, and giving due consideration to the community's interests and established standards. To meet these responsibilities, it is important that the collective bargaining role to be played by project contractor management be clearly determined in the light of project requirements and local conditions.

(a) In an area where DOE construction does not overshadow total local construction activity, and the majority of construction is performed by members of local contractor associations, DOE expects that basic conditions for labor on its projects will be negotiated between the local contractor associations and local unions and generally adhered to on construction work in the area. In such situations, DOE contractors will provide for clear identification and application of these local agreements to the DOE work. In such application, the conditions to be followed will be those which obtain in actual practice in the area covered by the agreement and are consistent with applicable laws, rather than those appearing from a literal interpretation of the language of the agreement. Conditions not covered by local agreements may be provided for as necessary to meet project goals.

(b) In some areas, local agreements may be nonexistent, or inadequate, or the employer parties may not be representative of the employers of the bulk of the labor force in the area. In such event, DOE contractors are expected to carry their share of the responsibility for negotiations and to negotiate directly or in cooperation with others to establish appropriate conditions.

(c) In an area where DOE construction work is of such magnitude as to overshadow local construction, it may be desirable for DOE contractors to negotiate special project conditions (on either a craft or a multi-craft basis) as the best way to meet their obligations to DOE. Such agreements usually involve the establishment of new bargaining units and are therefore dependent upon the voluntary cooperation of the building trades unions. Normally both the Building Trades Department (AFL-CIO) and the Senior Official, Office of Industrial Relations should be consulted in respect to any proposed course of action.

§9-50.1210-4 Role of DOE in construction labor relations.

DOE's role in construction labor relations is one of overall cognizance consistent with DOE's ultimate responsibilities. The scope of the construction program, the complexity of the problems which may arise, and the need for coordination among contractors at the same site are factors which affect the degree of influence exercised by DOE in carrying out the following responsibilities:

(a) To assure that careful advance survey and analysis are made of each contract situation and that the role of the contractor management is in accordance with the considerations in §9-50.1210-3;

(b) To establish effective machinery for coordination among project contractor management;

(c) With respect to DOE contracts carried out under area practices, to assure that conditions proposed are actually prevalent in the area or have other substantial foundation and that, to the extent consistent with the terms of lump-sum contracts, practices established by lump-sum contractors are not of a character that will unstabilize other DOE work;

(d) With respect to DOE contracts carried out under project agreement, both union and management, to take into account all relevant factors pertaining to any condtions peculiar to the project, duration of project, tenure of employment, housing and travel accommodations, length of regular work week, uniformity of shift, special subsidies, etc;

(e) To encourage contractor officials and representatives of employees to establish similar conditions among all construction employers for each class or classification of employees at a particular location;

(f) To encourage contractor officials and representatives of employees to provide clear identification and application of practices under local agreements, or to make and maintain project agreements on DOE construction projects; and

(g) To encourage contractor officials and representatives of employees to establish reliable working contact between the DOE project contractors and any unions that are cooperating in staffing the job.

§9-50.1210-5 Initial wage rates.

The wage rates initially established under both cost-type and lump-sum contracts will not be less than, and will normally conform to, those determined by the Secretary of Labor pursuant to the requirements of the Davis-Bacon Act. On cost-reimbursement work, the total compensation on the DOE project will be comparable with the total compensation allowed similar workers in an appropriate area of comparison. Where the DOE project is applying the practices under local agreements, the area of comparison normally will be the geographic area within the jurisdiction of each local union cooperating in staffing the project. In this situation, the application of local practices and agreements will usually be carried out on an item-by-item basis. Where a project agreement has been agreed on as the foundation for project conditions, the area of comparison for each craft should be large enough to provide a sound base which will result in realistic wage rates. In the development of a project agreement, the Office of Contractor Industrial Relations should be consulted.

§9-50.1210-6 Adjustments in compensation.

Subject to limitations imposed by applicable labor laws, changes in established wage rates and working conditions under cost-reimbursement type contracts may be effected as follows:

(a) Adjustments in wage rates and other job conditions established in project collective bargaining agreements may be effected by the renegotiation or modification of the agreements at appropriate times and by the reopening of existing agreements as provided therein. The Office of Industrial Relations should be consulted as to appropriate criteria to follow in review of such reopenings.

(b) In situations where DOE contractors working under costreimbursement type contracts apply local established job conditions included in applicable bargaining agreements, adjustments in wages and job conditions may coincide with changes within the locality. Wage rates may be adjusted to bring rates into conformity with new rates which are verified as established in the area at the time of their acceptance for DOE work.

§9-50.1210-7 National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry.

Construction contractors and representatives of employees are encouraged to settle craft jurisdiction disputes, in accordance with the procedural rules and regulations of the National Joint Board.

§9-50.1210-8 Responsibility of the Office of Industrial Relations.

The Office of Industrial Relations Headquarters, is responsible for coordinating all activities arising under this subpart, and for maintaining liaison with the Department of Labor, the Building Trades Department (AFL-CIO), and other construction labor and employer organizations.

§9-50.1211 Unemployment compensation.

§9-50.1211-1 General.

Each State has its own unemployment compensation system to provide payments to workers who become unemployed involuntarily and through no fault of their own. Funds are provided for unemployment compensation benefits through a payroll tax on employers. Most DOE contractors are subject to the unemployment compensation tax laws of the States in which they are located. It is the policy to assure, both in the negotiation and administration of cost-reimbursement type contracts, that economical and practical arrangements are made and practiced with respect to unemployment compensation.

§9-50.1211-2 Contractors exempt from State laws.

(a) Some contractors are exempt from State unemployment compensation laws, usually on grounds that they are nonprofit organizations or subdivisions of State governments. Most States, however, permit such employers to elect unemployment compensation coverage on a voluntary basis. Under such circumstances, all existing or prospective cost-reimbursement type contractors shall be encouraged to provide unemployment compensation coverage or equivalent substitutes.

(b) It is also policy that, prior to the award or extension of a cost-reimbursement type contract for the operation of a Government- owned facility, exempt contractors or prospective contractors shall be required to submit to the Contracting Officer a statement that they will either elect coverage or provide equivalent substitutes for unemployment compensation, or in the alternative, submit evidence that it is impractical to do so. If an exempt contractor or prospective contractor submits that it is impractical to elect coverage or to provide an equivalent substitute, appropriate Headquarters staff shall review that position prior to recommending an award or extension of the contract. If there are substantial reasons for not electing coverage or for not providing equivalent substitutes, a contract may be awarded or extended. Headquarters' staff review and recommendation shall be based on such factors as:

(1) The specific provisions of the unemployment compensation law of the State;

(2) The extent to which the establishment of special conditions on DOE work may have an adverse effect on the contractor's general policies and operating costs in its private operations;

(3) The numerical relationship between the contractor's private work force and his employees performing only work for DOE;

(4) The contractor's record with respect to work force stability and the general outlook with respect to future work force stability;

(5) In a replacement contractor situation, whether or not the prior contractor had coverage or suitable substitutes; and

(6) The particular labor relations implications involved.

§9-50.1212 Workers' compensation insurance.

§9-50.1212-1 Scope of subsection.

This subsection establishes the policies and requirements for insurance covering workers' compensation and employers' liability insurance applicable to DOE on-site service and operating contractors.

§9-50.1212-2 Policies and Requirements.

(a) Workers' compensation insurance protects employers against liability imposed by workers' compensation laws for injury or death to employees arising out of, or in the course of, their employment. This type of insurance is required by State laws unless employers have acceptable programs of self-insurance.

(b) Special requirements. Certain workers' compensation laws contain provisions which result in limiting the protection afforded persons subject to such laws. The policy with respect to these limitations as they affect persons employed by operating and other on-site contractors is set forth below:

(1) Elective provisions. Some workers' compensation laws permit an employer to elect not to be subject to its provisions. It is DOE policy to require these contractors to be subject to workers' compensation laws in jurisdictions permitting election.

(2) Statutory immunity. Under the provisions of some workers' compensation laws, certain types of employers, e.g., nonprofit educational institutions, are relieved from liability. If a contractor has a statutory option to accept liability, it is DOE policy to require the contractor to do so.

(3) Limited medical benefits. Some workers' compensation laws limit the liability of the employer for medical care to a maximum dollar amount or to a specified period of time. In such cases, a contractor's workers' compensation insurance policy should contain a standard extrastatutory medical coverage endorsement.

(4) Limits on occupational disease coverage; employer's liability. Some workers' compensation laws do not provided coverage for all occupational diseases. In such situations, a contractor's workers' compensation insurance policy should contain voluntary coverage for all occupational diseases.

(c) Contractor "employees' benefit plan" - self-insurers. The policies and requirements set forth in paragraph (b) apply where operating and other on-site contractors purchase workers' compensation insurance. With respect to self-insured contractors, the objectives specified in (b) also shall be met through primary or excess workers' compensation and employers' liability insurance policy(ies) or an approved combination thereof. "Employees' benefit plans" which were established in prior years may be continued to contract termination at existing benefit levels.

§9-50.1212-3 Assignment of responsibilities.

(a) Headquarters' officials and Heads of Procuring Activities, consistent with their delegations of responsibility, shall assure contractor operations at Government-owned installations are implemented consistent with the policies and requirements of §9-50.1212-2.

(b) In discharging assigned responsibility, Heads of Procuring Activities shall:

(1) Review periodically workers' compensation insurance programs of operating and on-site service contractors in the light of applicable workers' compensation statutes to assure conformance with the requirements of §9-50.1212-2;

(2) Evaluate the adequacy of coverage of "self-insured" workers' compensation programs;

(3) Provide arrangements for the administration of any existing "employees' benefit plans" until such plans are terminated; and

(4) Submit to the Office of Industrial Relations, all proposals for the modification of existing "employees' benefit plans."

(c) The Office of Industrial Relations is responsible for approving contractor "employees' benefit plans."

§9-50.1213 Conduct of employees and consultants of DOE operating, on-site, and certain other contractors.

§9-50.1213-1 Scope of subsection.

This subsection established the policies for maintaining satisfactory standards of conduct on the part of employees and consultants employed on DOE contract work by its operating and other on-site contractors and certain other contractors specified in §9-50.1213-2. Contracts with colleges and universities, which have adopted conflict-of-interest policies consistent with ACE-AAUP standards and do not involve the operation of Government-owned facilities on Government-owned or Government-leased land, are governed by the "Policy of the Federal Council for Science and Technology Relating to Conflicts of Interest by Staff Members of Colleges and Universities" (adopted March 29, 1966), and are not subject to this subsection.

§9-50.1213-2 Applicability.

(a) These policies are applicable to DOE contractors to the extent that their contracts with DOE contain provisions making this subsection applicable; or instructions have been issued under appropriate provisions of their contracts with DOE directing compliance with this subpart.

(b) The contract clause contained in the note to §9-50.704-12 requiring the contractor to establish such procedures as are necessary to implement effectively the provisions of this subsection, subject to the approval of the Contracting Officer, shall be included in:

(1) All new DOE operating and on-site service contracts;

(2) Other DOE contracts (including time and materials contracts) with respect to which the Senior Procurement Official, Headquarters, or designee, or a Head of a Procuring Activity, as appropriate, determines that the nature of the work to be performed and the duration of the contract make the application of these policies necessary in the public interest; and

(3) Major modifications (involving change in scope or other significant substantive changes) or extensions of existing contracts within the foregoing categories, except that such contract clause will be excluded from all contracts of less than $250,000.

(c) The contract clause contained in §9-50.704-27(a) concerning necessary approvals to be obtained by contractor employees before performing consultant or similar services for another DOE contractor shall be included in:

(1) All new DOE operating and on-site service contracts except those identified in paragraph (d) below; and

(2) Major modifications (involving change in scope or other significant substantive changes) or extensions of existing contracts within the foregoing category.

(d) The contract clause contained in §9-50.704-27(b) concerning necesssary approvals to be obtained by contractor employees before performing consultant or similar services for another DOE contractor, or in the energy field for another organization, shall be included in:

(1) All new DOE cost-reimbursement type contracts for the design or construction of Government-owned facilities or for research or operations where a substantial portion of the

land or buildings used for such research or in such operations is owned or controlled by the Government; and

(2) Major modifications (involving change in scope or other significant substantive changes) or extensions of existing contracts within the foregoing category.

(e) Exceptions to the requirements of paragraphs (b), (c), and (d) will be permitted only with the approval of the Senior Procurement Official, Headquarters.

§9-50.1213-3 Gratuities.

A contractor or its employees or consultants shall not, under circumstances which might reasonably be interpreted as an attempt to influence the recipients in the conduct of their duties, accept any gratuity or special favor from individuals or organizations with whom the contractor is doing business, or proposing to do business, in accomplishing the work under the contract. Reference should be made to the provisions of 41 U.S.C. 51-54.

§9-50.1213-4 Use of privileged information.

Employees and consultants of a contractor shall not use for personal gain or make other improper use of privileged information which is acquired in connection with their employment on the contract work. In this connection, the term "privileged information" includes but is not limited to, unpublished information relating to technological and scientific developments; medical, personnel, or security records of individuals; anticipated materials' requirements or pricing action; possible new sites for DOE program operations; and knowledge of selections of contractors or subcontractors in advance of official announcement.

§9-50.1213-5 Outside employment of contractor employees.

Employees of a contractor are entitled to the same rights and privileges with respect to outside employment as other citizens. Therefore, there is no general prohibition against employees having outside employment. However, no employee of a contractor performing work on a full-time basis under an DOE contract shall engage in employment outside official hours of duty or while on leave if such employment will:

(a) In any manner interfere with the proper and effective performance of the duties of the position;

(b) Appear to create a conflict-of-interest situation, or

(c) Appear to subject DOE or the contractor to public criticism or embarassment.

§9-50.1213-6 Information statement concerning consultant or other employment service.

If the consultant or other outside employment service of the employee involves the use of information in the area of the employee's contract employment, the contractor will be responsible for requiring that the employee file with the contractor, an information statement containing such information concerning the outside employment as the contractor may prescribe. As a minimum, the information statement shall include a description of any patent agreements that may be involved and the following certificate:

> I acknowledge that I have read and am familiar with the published policy of the DOE contained in:
>
> (a) Subpart 9-50.1213, "Conduct of employees and consultants of DOE operating, on-site, and certain other contractors," and
>
> (b) DOE publication (formerly ERDAM Chapter 3201) entitled, "Reporting Results of Scientific and Technical Work Funded by DOE," which states in part that significant new results produced in DOE-funded scientific and technical work shall be reported to the DOE. In accordance with this policy, I agree not to withhold or delay reporting information acquired

through my employment with ________ in favor of

____

______ with whom I have made or am contemplating making a consulting agreement. I have also read and am familiar with the requirements of my employer's contract with DOE relating to patents. To the best of my knowledge or belief, the activities to be performed under this consulting agreement will not conflict with the policy set forth in DOE-PR § 9-50.1213, the patent provisions of my employer's contract with DOE, or with the responsibility of my employer to report fully and promptly to DOE all significant research and development information. If in the course of my activities under this consulting arrangement, it appears that such a conflict may arise, I will promptly notify and consult with my primary employer

____

______ concerning such possible conflict.

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§9-50.1213-7 Allowable and unallowable costs.

Reference should be made to §9-50.704-13(d)(3) and (e)(26), §9-50.704-14(d)(3) and (e)(24), and §9-50.704-16(d)(3) and unallowable costs in connection with obtaining consultant services.

§9-50.1213-8 Incompatibility between regular duties and private interests.

Employees and consultants of a contractor shall not be permitted to make or influence any decisions on behalf of the contractor which directly or indirectly affect the interest of the Government, if the employee's or consultant's personal concern in the matter may be incompatible with the interest of the Government. For example, (a) an employee or consultant of a contractor will not negotiate, or influence the letting of, a subcontract with a company in which the individual has an employment relationship or significant financial interest; and (b) an employee or consultant of a contractor will not be assigned the preparation of an evaluation for DOE or for an DOE contractor of some technical aspect of the work of another organization with which the individual has an employment relationship, or significant financial interest, or which is a competitor of an organization (other than the contractor who is the individual's regular employer) in which the individual has an employment relationship or significant financial interest. The contractor shall be responsible for informing employees and consultants that they are expected to disclose any incompatibilities between duties performed for the contractor and their private interests and to refer doubtful questions to the contractor.

Subpart 9-50.14 Inspection and Acceptance

§9-50.1401 Government inspection of supplies under subcontracts.

The limitations in FPR 1-14.108 do not apply to procurements by operating or on-site service contractors for the account of DOE.

§9-50.1402 Contract articles relating to inspection and acceptance.

Articles relating to inspection and acceptance, used in subcontracts and purchase orders by operating and on-site service contractors, should provide no less protection for the Government than are provided by the contract articles in the prime contracts.

OMB Control No.: 1901—0021.

Subpart 9-50.15 Contract Cost Principles and Procedures

§9-50.1500 Scope and applicability of subpart.

The contract cost principles and procedures for operating and on-site service contracts are contained herein.

(a) This subpart sets forth the general policy and principles for the determination of allowable costs which are applicable to the negotiation and administration of cost-type contracts.

(b) The terms "reimbursement" and "reimbursable" are used interchangeably in this subpart in relation to "allowable costs" as a matter of editorial convenience. No "reimbursement" is actually involved in those situations where the cost-type contractor makes payments for "allowable costs" from Government funds advanced to him by the DOE.

§9-50.1501 Definitions.

(a) "Cost-type contract" includes cost, cost-sharing, cost-plus-a-fixed-fee, cost-plus-award-fee, and cost-plus-incentive-fee contracts.

(b) "Cost-type subcontract" is a cost-type arrangement in any tier under a cost-type prime contract where all higher-tier arrangements are on a cost basis.

(c) "Operating contract" is a cost-type contract for the operation of a Government-owned facility, such as a production facility or a research and development facility.

(d) "Construction contract" is a contract for the construction, alteration, or repair of public buildings and public works.

(e) "Architect-engineer contract" is a contract for architect-engineer services related to the construction, alteration, or repair of public buildings and public works.

(1) "Off-site architect-engineer contract" is a contract where the design work is performed in the contractor's central or branch office.

(2) "On-site architect-engineer contract" is a contract where relatively complete staffing is required for the design work at an office, other than a central or branch office of the contractor, and where a minimum of support is required from the contractor's central or branch office staff. The office where the design work is performed may be at the construction site or any other location.

(f) "Supply contract" is a contract for supplies and services, other than operating, construction, on-site architect-engineer, experimental, developmental or research work, and personal services.

(g) "Research and development contract" is a contract for basic research (directed toward the increase of knowledge in science); applied research (involving the determination and expansion of the potentialities of new scientific discoveries or improvement in technology, materials, processes, methods, devices, and techniques including attempts to "advance the state of the art"); or development (the systematic use of scientific knowledge which is directed toward the production of, or improvements in, useful products to meet specific performance requirements, but exclusive of manufacturing and production engineering).

§9-50.1502 Responsibilities

(a) The Senior Procurement Official, Headquarters, is responsible for developing and revising the policy and procedures for the determination of allowable costs, and for seeing that they are properly coordinated with the General Counsel, and other Headquarters' offices having joint interests.

(b) The Head of the Procuring Activity is responsible for following the policy, principles and standards set forth herein in establishing the compensation provisions of contracts and subcontracts and for submission of deviations for Headquarters consideration.

§9-50.1503 Deviation.

Deviations from the policy and principles set forth in this subpart shall not be made unless such action is authorized by the Senior Procurement Official, Headquarters, after consultation with the General Counsel, and any other appropriate Headquarters office, on the basis of a written justification stating clearly the special circumstances involved. Where appropriate, any approved deviation shall be reflected in the compensation provisions of the contract.

§9-50.1504 (Reserved)

§9-50.1505 General policy.

The general policy of DOE is as follows:

§9-50.1505-1 Actual cost basis.

(a) DOE reimburses its contractors for allowable costs actually incurred in the peformance of their contracts in accordance with their terms. Such allowable costs are those provided for in the contract to the extent that they are necessary or incident, and either directly attributable or equitably allocable to the work under the contract. This broad expression of the DOE's reimbursement policy is further developed and elaborated upon throughout this subpart.

(b)(1) DOE uses retrospective or after-the-fact determination, usually called the "actual cost basis," to establish the amount reimbursable to its contractors for their allowable costs. This general policy precludes the use of predetermined fixed-overhead percentage rates except for provisional payment under paragraph (d) of this section.

(2) It is recognized, however, that the total volume of work with a particular contractor in some cases may be so small that computation of the actual indirect costs may not be justified. In such cases it may be administratively desirable to adopt some alternative, such as a predetermined amount for indirect costs. However, a departure from the actual cost basis under a cost-type contract is considered administratively undesirable, if the amounts involved are significant, and the use of either a predetermined amount for indirect costs, except under the circumstances noted above, or other alternatives (such as a fixed billing rate for labor and overhead per direct labor hour) shall be submitted to Headquarters for approval. Any firm amount established for indirect costs, whether small or significant, and any other alternative shall be supported by a well-considered conclusion that the firm amount or other alternative will result in approximately the same compensation for the costs concerned as would likely result from determination on the actual cost basis. The negotiation of predetermined fixed amounts, fixed billing rates, etc., shall be made on the basis of actual cost experience and satisfactory cost projections, and in accordance with the principles and standards set forth in this subpart. Such amounts, rates, etc., will cover allowances only for allowable costs.

(c) When firm compensation for any otherwise allowable cost is negotiated, the items of such cost covered by the fixed amount shall be set forth in the contract or appropriate appendices as unallowable with maximum clarity, in order to distinguish between allowable costs subject to reimbursement and costs which are covered by the negotiated fixed amount, and hence excluded from allowable cost in the case of the particular contract.

(d) Provisional payments on account of indirect costs incurred under the contract shall be provided for only after review of the contractor's system of accounting, including items treated as indirect costs and methods of distributing them or on the basis of previous audits or past experience with the particular contractor. Based on such a review, a provisional overhead rate or rates shall be established taking into consideration the prior year's experience adjusted to eliminate nonrecurring costs and to any new conditions which may be applicable to the future. Such rate or rates shall be applied to an appropriate base or bases for computation of the provisional payments. The actual overhead shall be determined not less often than annually and the provisional payments made shall be adjusted accordingly. Prior to final settlement of the entire contract, the actual overhead so determined periodically shall be subject to appropriate subsequent adjustment including errors subsequently becoming known. The amount of any adjustment shall promptly be paid or credited by the DOE to the contractor, or by the contractor to the DOE, as the review has determined.

§9-50.1505-2 Compensation through fee.

(a) DOE compensates operating, construction and on-site architect-engineer contractors through the fixed fee for general and administrative expenses incurred in the general management and administration of the contractor's business as a whole by the contractor's home, divisional, or branch offices.

(b) In a particular case, the contractor may be compensated on the basis of allowable cost, rather than through the fixed fee for some or all of the expenses described in paragraph (a) of this section, if the Head of the Procuring Activity, or a representative having the authority to approve the contract, authorizes use of this alternative approach and determines that the negotiated fixed fee reflects proper downward adjustment from that which would otherwise have been established. In the case of no-fee contracts (including contracts providing for nominal or token fees), this category of expense may be either reimbursed on the basis of actual costs or compensated through a predetermined fixed amount.

(c) The above-stated policy does not preclude the payment of expenses merely because they are incurred or accounted for at or by the contractor's home, divisional or branch offices; where expenses of a type typically incurred at construction or operation sites in support of the contract work, are, by reason of a particular contractor's greater centralization, incurred at such offices, rather than at the operation site, such expenses may be reimbursed.

(d) In the case of on-site architect-engineer contracts, the Contracting Officer may approve performance of some of the work in the contractor's central or branch office location. The direct costs of such work and an equitable portion of such indirect costs at the central office or branch office location, as are properly applicable and apportionable to such work, are allowable. In such cases, the indirect costs attributable to the performance at a central office or branch office location of work related directly and solely to individual contracts shall be distinguished with care from general and administrative expenses incurred by the contractor's home or branch offices in the general management, supervision, and conduct of its business, since these general administrative expenses are usually compensated for through fee and, in any event, where allowable, are related to and apportionable over all work under the supervision of the office concerned.

(e) As to work performed by an Operating Contractor in its own facilities, see §9-50.1507-3.

§9-50.1505-3 General basis for determination of costs.

The total reimbursable cost of a DOE cost-type contract is the sum of the allowable (allocable and reasonable) direct costs necessary or incident to the performance of the contract, plus the properly allocable portion of the allowable indirect costs, less applicable income and other credits. In determining allowability and reimbursability of costs, there shall be considered also:

(a) Reasonableness, including the exercise of prudent business judgment;

(b) A cost is allocable if it is assignable or chargeable to one or more cost objectives in accordance with the relative benefits received or other equitable relationship.

(c) Application of generally accepted accounting principles and practices appropriate to identify and measure costs of performing the contract in accordance with this subpart;

(d) All exclusions of and limitations on types and amounts of items of cost set forth in the contract;

(e) Approvals by the Contracting Officer required under the contract terms; and

(f) Cost accounting standards if applicable.

§9-50.1505-4 Cost determination based on audit.

(a) The amount reimbursable under cost-type contracts shall be determined in accordance with the terms of the respective contracts on the basis of audit. In the event that the contractual terms differ, or are inconsistent with (see §9-50.1503 for approval of deviations), the principles stated herein, the contractual terms control. The audit is performed directly by DOE (or by the cognizant Federal agency pursuant to arrangements made by th DOE) in the case of cost-type contracts. Contracting Officers shall assure that cost-type prime contractors assume the responsibility for audit of subcontractors (and provide for the audit of lower tier subcontractors by the subcontractor immediately preceding in the contractual chain) except as noted in this paragraph. Exceptions may be made to this general principle of subcontractors being audited by the next higher-tier contractor, where the latter, interrelated with the subcontractor involved, does not have the necessary audit facilities, or for other reasons, is not in a position to perform the subcontract audit in a manner satisfactory to DOE. In the event of such exception, the subcontract audit responsibility shall rest with the successively higher-tier contractor (or ultimately DOE), but responsibility for determining the costs reimbursable to the subcontractor remains with the next higher-tier contractor on the basis of such audit.

(b) Audit by other Federal agencies: Where the amount of cost-type work to be performed for DOE in a particular facility is less than that being performed at the same facility for other Federal agencies, arrangements may be made to have the cognizant agency perform the audit of the DOE contract or subcontract. These arrangements shall be made administratively between DOE and the other agency involved, and wherever possible, shall provide for the cognizant agency to audit against the DOE cost principles. In no case, however, shall the arrangements preclude determination by the DOE Contracting Officer of the allowable and unallowable costs in accordance with §9-50.704-13 through §9-50.704-16. Steps appropriate in the light of the magnitude and nature of the costs shall be taken by the Contracting Officer to ascertain that the audit results properly reflect the application of DOE cost principles (particularly as to types and amounts of items of cost including incidence, allocability, and equitable distribution thereof).

§9-50.1505-5 Contractor's system of accounting.

(a)(1) Careful DOE study of the contractor's usual accounting procedures shall be made prior to arriving at an understanding with the contractor as to the accounting system to be employed by the contractor during the period of contract performance.

(2) The contractor's customary accounting practices are usually accepted if they conform to generally accepted accounting principles, produce equitable results, are consistently applied, are not in conflict with the provisions of this subpart, are conducive to accurate costing of the contract work, and produce reports required by the DOE.

(b) It is DOE's policy to discourage firm contractual provisions relating to the contractor's accounting system (including methods for computing indirect costs) which preclude appropriate retrospective modification. No firm contractual provision shall be included in the contract where there is no previous Government contracting experience with the contractor's methods of operation and accounting. Contracting Officers may, however, include firm contractual provisions, when there is a comprehensive understanding of the contractor's methods of operation and accounting as a result of Government contracting experience in dealing with the contractor; and the Contracting Officer makes a determination, based on a DOE study thereof, that the contractor's accounting procedures are likely to produce equitable results in the future as in the past. Such firm contractual provisions shall be subject to adjustment retroactively at the request of either party to the contract when the method of overhead determination has become inequitable as a result of:

(1) Any substantial difference accruing between the cost patterns of work under the contract and other work of the contractor; or

(2) Any significant change occurring in the nature of the business, the extent of subcontracting, fixed asset improvement program, the inventories, the volume of sales and production, manufacturing of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances.

§9-50.1506 Advance understandings on particular cost items.

It is important that agreement between DOE and its contractors be reached in advance of the incurrence of costs in categories where reasonableness or allocability are difficult to determine in order to avoid possible subsequent disallowance or dispute. Any such agreement should be incorporated in cost-type contracts and should govern the cost treatment covered thereby. But the absence of such agreement on any element of cost will not, in itself, serve to make that element either allowable or unallowable. Examples of costs on which advance agreements may be particularly important are:

(a) Deferred maintenance costs;

(b) Precontract costs;

(c) Professional or technical consulting services;

(d) Reconversion costs;

(e) Research and development costs;

(f) Royalties;

(g) Selling and distribution costs;

(h) Unemployment insurance experience ratings;

(i) Employee compensation, travel including relocation costs, and other personnel costs. DOE generally utilizes two basic methods of achieving and recording understandings with contractors as to the allowability of employee compensation, travel, and other personnel costs: Negotiation of a personnel appendix to the contract, which sets forth the policies, programs, and schedules which are accepted as the basis for determining the allowability of costs; or reviewing and reaching agreement on established policies, programs, and schedules (and any changes thereto during the contract term) applicable to the contractor's private operations which are acceptable for contract work and which will be consistently followed throughout the contractor's organization. A personnel appendix to the contract setting forth advance understandings covering compensation for personal services shall be utilized in operating contracts (as defined in §9-50.001) and other contract situations when one or more of the following circumstances exist: when policies, programs, and schedules are established specifically for contract work; when the contractor's work is predominantly or exclusively made up of negotiated Government contract work; when contract work is so different from the organization's private work that existing established policies, programs, and schedules cannot reasonably be extended to and consistently applied on contract work; or, when established policies, programs, and schedules proposed for contract work are not sufficiently definitive to permit a clear advance mutual understanding of allowable costs and to provide a basis for audit. The Head of the Procuring Activity is authorized to select the alternative method of achieving and recording advance understanding that they find most appropriate, after considering the facts of the particular contract situation. Employee compensation, travel, and other personnel costs as used in this paragraph include:

(1) Compensation for personal services, including wages and salaries, bonuses and incentives, premium payments, pay for time not worked, and supplementary compensation and benefits, such as pension and retirement, group insurance, severance pay plans, and other forms of compensation covered by §9-50.1510-14;

(2) Morale, health, welfare, and food service and dormitory costs;

(3) Training and education costs; and

(4) Employee travel costs, including travel on official business, relocation of employees, foreign travel, travel of executive officers, and special or mass personnel movement.

§9-50.1507 Direct and indirect costs.

§9-50.1507-1 Explanation of direct costs and indirect costs.

(a) The classification of an item of cost as a direct cost or as an indirect cost has reference to the manner in which the particular cost is charged to or lodged against the products manufactured, work done, or services performed. In general, "direct costs" are those which are identified as having been incurred specifically for, or on account of, a particular product (or lots of similar products), work order, job, or contract. Materials, labor, or expenses which relate specifically and solely to the manufacture of a particular product or to the performance of a distinct job or work are broad examples of direct costs.

(b) "Indirect costs" are comprised of items of material, labor, and expenses which benefit not only a particular product or a specific unit of work, but also other production or work; and are so related to the particular product or specific task that the amount of the cost which should properly be lodged against it cannot be precisely determined, at least without effort entirely disproportionate to the increased accuracy achieved. There is no universal rule that under every accounting system, certain items of cost shall be treated as direct or as indirect costs. It is essential, however, that within the accounting system of any given organization, each item of cost be consistently treated in the same manner. Also, since indirect costs must ultimately be lodged against the various products, work orders, jobs or contracts which benefit from their incurrence, it is necessary to establish ways or means of apportioning or distributing these indirect costs equitably to all work concerned. Since the means of accomplishing this distribution of indirect costs are necessarily somewhat arbitrary and not precisely correct, accuracy is best attained by treating as direct costs, all items of cost which are susceptible of such handling and by limiting to the greatest practical extent, the number of items of cost which are treated as indirect costs. The contractor's accounting system should be examined and modified so that such results are achieved. (See §9-50.1505-5.)

§9-50.1507-2 Indirect costs.

(a) The contractor's indirect costs, which must be appropriately identified and supported by adequate documentation, must be carefully examined with the objective of excluding, for reimbursement purposes, all types of indirect costs that are either unallowable in nature (see list of examples in standard cost articles §9-50.704-13 through §9-50.704-16) or not properly allocable to performance of work under the DOE contract. It may be that only a portion of a given pool of indirect costs will fail to meet these tests and require such exclusion. After excluding all such expenses, the remaining indirect costs require allocation by an acceptable method or methods that result in equitable charges to the DOE contract. Any item or items of indirect cost that are so excluded in whole or in part shall include an amount for absorption of their appropriate share of other related indirect and administrative expenses.

(b) The methods of allocation of indirect costs shall be determined in accordance with the policy and procedure outlined in §9-50.1505-5(b). Careful reviews shall be made from time to time as appropriate, particularly where there is a significant change in the nature or volume of activity, to determine whether the method or methods of allocation previously used, continue to be equitable. The ultimate objective in allocating indirect costs is to charge fair shares of the various expenses concerned to the DOE contract work. The appropriate method or methods of allocation are dependent upon the particular circumstances and conditions; hence, no general rules can be stated as to particular methods or bases of allocating indirect costs applicable and appropriate in all cases. One method may be determined to be appropriate for allocating certain indirect costs but not others, in which case, a different method or methods must be established which will equitably allocate the other indirect costs. This means that it may be necessary to establish separate pools of indirect costs for particular items of expense and to use separate methods of allocation for each pool in order to establish equitable results.

§9-50.1507-3 Company general and administrative expenses.

Although the DOE generally compensates operating, construction and on-site architect-engineer contractors through fee for company general and administrative expenses (see §9-50.1505-2), it allows such company general and administrative expenses under off-site architect-engineer, supply, and research contracts with commercial contractors performing the work in their own facilities. Contractor's general and administrative expenses may, however, be included for reimbursement under DOE off-site architect-engineer, supply, and research contracts, only to the extent that they are established, after careful examination, to be allowable in nature and properly allocable to the work. Work performed in a contractor's own facilities under an operating or construction contract may likewise be allowed to bear the properly allocable portion of allowable company general and administrative expense.

§9-50.1508 Negotiated fixed-price contracts where costs incurred are a factor in determining the amount payable.

§9-50.1508-1 General policy.

See §9-3.807 and FPR 1-3.807.

§9-50.1508-2 (Reserved).

§9-50.1508-3 Contractor's cost accounting system.

Where a fixed price contract with price redetermination provisions (including the incentive type) is involved, it should be determined at the inception of the contract that the contractor's accounting system is maintained in accordance with generally accepted accounting principles and practices and will equitably reflect the costs of contract performance. This may be done either on the basis of a survey of the accounting system, previous experience with the contractor, or by such other means as may be considered satisfactory to the Contracting Officer.

§9-50.1509 Treatment of indirect costs.

For purposes of allowability, indirect costs, like direct costs, are subject to the requirements of §9-50.1505-3 with respect to the general basis for determination of costs.

§9-50.1509-1 Direct charging of costs.

The nature of some types of cost, possibly significant in amount, and their relationship to the contractor's work may be such as to necessitate their treatment as indirect costs. However, in order to secure the most accurate and equitable results, the various types of cost normally treated as indirect costs by the contractor under its regular accounting procedures should be examined to determine which types should, for purposes of reimbursement under the DOE contract, be treated as direct costs. Such action should be taken whenever the increased accuracy that results is sufficiently material to justify the expenditure of the additional time, effort, and expense entailed. Where a type of cost is charged direct to the DOE contract, no item of similar character, which on the same basis is chargeable only to other work, should be included in indirect costs apportioned to the DOE contract. Treatment of items of cost as direct charges, consistently as to both the DOE contract and the contractor's other work, should be employed to the fullest extent practicable, correspondingly reducing the volume of costs to be treated as indirect costs that require distribution by arbitrary methods which are not precise and accurate and therefore, at best, produce only approximate results.

§9-50.1509-2 Appropriate departmentalization.

Appropriate departmentalization for cost-reimbursement purposes shall be effected between different kinds of productive activity, such as:

(a) Between manufacturing involving substantial expenses of machinery depreciation, machinery operation and maintenance, space, electric energy, tools, etc., and research generating relatively small overhead costs;

(b) Between heavy manufacturing requiring expensive equipment and power machinery, and light manufacturing which, by comparison, is practically a hand operation;

(c) Between research work requiring an elaborate layout of laboratory facilities and equipment, and research involving primarily the application of mental effort and requiring little or no equipment. The objective and result should be to burden manufacturing work or different kinds of manufacturing work, and research work or different kinds of research work each with the indirect costs properly applicable to the respective kind of work. If a nondepartmentized plant or individual department is so constituted that the indirect costs, rather than relating fairly proportionately to all work in the plant or department, particularly to the work under the DOE contract, relate more to some work than to other work, consideration should be given to further departmentization. The costing refinement may be made on a quasi-department basis from data furnished by the existing accounting system or developed on as reasonable an analysis as the facts and circumstances permit. The further departmentization should preferably be incorporated into the contractor's own accounting system.

§9-50.1509-3 Distribution of service department costs to production departments.

The total indirect costs of each productive department include an appropriate share of the costs incurred by the nonproductive or so-called service departments, such as the maintenance department, the power plant department, stores handling department, and tool room department. The basis used to distribute the costs of each individual service department should result in equitable allocation of the service department costs to the productive departments, particularly those productive departments in which work under the DOE contract is performed. In the case of each service department, the distribution method used should be appropriate in the circumstances, whether it be based on number of workers, floor space occupied, measurable services, total labor costs, total labor hours, some other basis, or a combination of methods.

§9-50.1509-4 Distribution of indirect costs of productive departments to work done.

In order to distribute the indirect costs of a productive department to the work done in the particular department, it is necessary that the apportionment be based on a factor which is common to all work performed in the particular department, and which closely approximates the extent to which the services represented by the indirect costs of the department are utilized in performing the work done on the individual contracts and work orders. The variety and complexity of production work makes it difficult to determine the most appropriate and equitable common denominator for distributing a department's indirect costs to the department's work. Since, insofar as the use made of services represented by a productive department's indirect costs is concerned, the major factor common to all work of the department is either direct labor cost or the time required for performance, the methods commonly used for distributing a department's indirect costs, each of which is based on one of these two factors, are:

(a) The direct labor cost method.

(b) The direct labor hour method.

(c) The departmental hourly rate method.

(d) The machine hours method.

Which of these methods is most appropriate for a particular department depends on whether distribution of the department's indirect costs equitably should be proportionate to the department's costs of direct labor, hours of direct labor, or hours of machine use. If the contractor's departmentization follows sound and recognized lines of organizational subdivision, one of these methods usually will be found sufficiently accurate and equitable to be accepted. If not, departmental refinement or quasi-departmentization may be required, or combinations of the above methods or the development of other methods equitable in the particular circumstances may be necessary.

§9-50.1509-5 General and administrative expenses.

(a) Allowability. As indicated in §9-50.1507-3, a contractor's general and administrative expenses may be accepted for apportionment to work under a DOE off-site architect-engineer (see also §9-3.404-50(f), supply, or research contract only to the extent that they are established, after careful examination, to be allowable in nature and, on the basis of incidence to its performance, properly allocable to the work. The following are a few examples of expenses which, although not unallowable because of their basic nature, are not incident to the performance of an DOE contract:

(1) The salaries and expenses of corporate officers, and their staffs, whose services do not apply to the performance of the DOE contract work, e.g., those whose services are devoted to sales activities promoting the marketing of the contractor's manufactured products; or to matters completely separate from the contractor's manufactured products, such as the merchandising of products made by others; or to the handling of investments so substantial as to constitue, in effect, a separate business.

(2) Legal and other expenses in connection with applications for patents for the contractor's account.

(3) Outgoing freight costs, inapplicable to the DOE contract products because delivery of such products is taken f.o.b. contractor's plant.

(4) Expenses (depreciation, operation, and maintenance of buildings and equipment, labor, and other costs) applicable to warehousing and storage of the contractor's products but not incident to the products under the DOE contract because they are delivered upon completion.

(5) Expenses of maintenance and repairs which would normally have been performed in an accounting period prior to the period of performance of the DOE contract but which for some reason—possibly abnormal operating conditions, shortages or high costs of materials or labor, or lack of funds—have been deferred.

(b) Allocation. No one method of distribution can be stated to be always most equitable and best for purposes of distributing a contractor's allowable and properly allocable general and administrative expenses to individual jobs and, specifically, to work for DOE. Careful consideration of the expenses themselves, of differences in work performed, and of the relationship of the expenses to the different kinds of productive activity is necessary, in each case, to assure that the method used produces fair and equitable results in the particular circumstances. Several of the methods frequently employed are briefly discussed below.

(1) Total manufacturing costs (including material) may in many cases be an appropriate basis for distributing general and administrative expenses to jobs in which the relation among the component cost elements is substantially the same as the cost pattern of the contractor's work generally. However, they would be an inappropriate basis in the case of a job whose material cost component, due to heavy material purchases and subcontracting, is abnormally high by comparison with the general cost pattern of the contractor's total work. In such a case, the normal general and administrative expense rate applicable to total manufacturing cost, arrived at on the basis of the general cost pattern of the contractor's work, should be appropriately adjusted because of the special circumstances pertaining to the particular job, or a different basis of allocation should be used to distribute general and administrative expenses to the job. For cost reimbursement purposes, total manufacturing costs generally constitute a more appropriate base for the distribution of general and administrative expenses than does either the total cost of goods sold or total sales. Each of these latter bases may be deficient and inequitable, in that it distributes general and administrative expenses to work sold, rather than to work performed during the period concerned.

(2) Processing costs are used in many cases as the basis for allocating general and administrative expense. If the major indirect costs attributable to material—such as purchasing, receiving, inspecting or testing, internal handling (to stockrooms and to jobs directly from stockrooms), storing, inventorying, controlling, and issuing materials—are either included in indirect manufacturing costs or segregated and treated separately as material burden or material-handling expense, it will probably be more equitable to exclude material cost from, than to include it in, the base for allocating general and administrative expense. However, exclusion of material cost from the base for allocation of general and administrative expense, where the administrative costs attributable to materials are accounted for as general and administrative expenses, might well be subject to the criticism that costs which contribute to the generation of general and administrative expenses are not included in the base for their allocation.

(3) Direct labor cost alone is sometimes used as the basis for allocating general and administrative expenses. However, in many cases use of this method would be inappropriate since it fails to recognize that processing costs other than direct labor and also, to some extent at least, material costs, serve to generate and to benefit from the incurrence of general and administrative expense. The propriety of this method would be subject to serious questions in a situation where the cost pattern of a particular job (i.e., the portion of the cost representing labor, other processing costs, and material) differs significantly from the normal cost pattern of the contractor's total work.

(c) Allocation of home office expenses of multiplant organizations. In the case of a multiplant organization, there will be, in addition to the general and administrative expenses of the individual plants, overall company general and administrative expenses. These latter expenses require distribution or apportionment to all of the company's plants and other activities on an equitable basis or bases. Generally, these overall company expenses are not distributed to the company's various activities as a single pool of expense. Rather, individual classifications of expense or categories of similar types of expenses are spread separately on varied bases—such as number of employees, total payrolls, total manufacturing costs, services rendered, time devoted, and allocations based on the results of detailed studies and analyses in prior years. The total activities of an organization may include, in addition to manufacturing, separate and distinct operations (such as sale and distribution of standard commercial products of the company's own manufacture, merchandising of products made by and purchased from other manufacturers, and investment activities) so varied and dissimilar, as to render extremely difficult, the problem of determining the proper factors to serve as common denominators for the fair and equitable allocation of the overall company expenses. Moreover, each expenditure within a given expense classification probably does not benefit all activities in the same way and to the same extent as does any other expenditure in the same expense classification. The foregoing serves to emphasize that the relationship of company general and administrative expenses to individual plants and other activities is not susceptible to precise evaluation. The objective must be, as to the particular classification or categories of such expense, a basis of apportionment which accomplishes its reasonable and equitable, though admittedly only approximately correct, distribution to the company's various activities, particularly those in which work for DOE is performed.

§9-50.1510 Application of basic principles to particular situations.

This guide contains examples of the application of the policy and principles outlined in Subpart 9-50.15 to particular situations.

§9-50.1510-1 Consideration of costs confined to locations involved.

If a contractor does work for DOE at two or more plants, offices, or departments, the indirect costs of each plant, office, or department will be applied only to the work of the particular plant, office, or department. Separate treatment of plants, offices, and departments for accounting purposes is always important; this importance is further accentuated if one of them is furnished with DOE equipment. Similarly, where a contractor that operates more than one plant, office, or department does work for DOE at only one particular location, only the costs applicable to the particular location involved should be considered in costing the DOE work. The costs related to the other plants, offices, or departments which do not perform services in connection with the DOE contract, are inapplicable to the work under the DOE contract.

§9-50.1510-2 Field work.

Where a contractor conducts operational activities both at its plant and at field locations, the apportionment to the field work of indirect operating costs incurred at the plant should be confined to only those expenses which are actually applicable to the field work. For example, indirect labor, idle time of direct labor, and other indirect costs applicable only to the contractor's operational activities at the plant location should not be apportioned to field work. Moreover, if the indirect operating expenses applicable to field work, as well as work at the plant, are apportioned on the basis of direct labor, direct labor at the field location should, for purposes of the apportionment at least, be distinguished from indirect labor at that location on a basis paralleling the classification of labor as between direct labor and indirect labor at the plant location. Similarly, if idle time of personnel normally treated as direct labor is involved at the field location, such idle time should be excluded from direct labor for purposes of distributing indirect operating costs incurred at the plant that are applicable to the field work. Also, if the field operation's direct labor cost involves wage or salary increments for services abroad or in isolated areas, such increments should be excluded from the direct labor cost base for purposes of distributing applicable indirect operating costs.

§9-50.1510-3 Use of Government-owned facilities.

If the Government furnishes the contractor, or the contractor acquires at Government expense, Government-owned equipment with which to do all or a significant amount of the work under the DOE contract, on which equipment the Government is bearing the expenses of depreciation, maintenance, insurance, and taxes, appropriate procedures must be established to avoid apportioning to DOE work performed with DOE-owned equipment, a share of the expenses of depreciation, maintenance, insurance, and taxes on the contractor's equipment not used to perform such work. If the Government-owned equipment is placed in a segregated area, that area should be accounted for as a separate department. If the Government-owned equipment is not placed in a separate area, other steps must be taken to avoid what would amount to a double equipment burden on work performed with the Government-owned facilities. Such work should be so accounted for as to be relieved of charges for expenses related to contractor's equipment not used in its performance.

§9-50.1510-4 Contractor's costs covering plant and equipment.

Charges relating to contractor-owned plant and equipment should be restricted to the applicable costs, such as depreciation, maintenance, insurance, and taxes, and should not be on a rental basis. (Compensation in excess of cost is covered by the fixed fee.) Rentals of plant and equipment owned by third parties are normally allowable, if the rates are reasonable in the light of the type, value, condition of the property involved, and option and other provisions of the lease agreement. However, where the plant and equipment used by the contractor is rented by the contractor under a sale and lease-back agreement, only the normal costs (such as depreciation, maintenance, insurance, and taxes) that would have been incurred if the contractor had retained legal title to the facilities, should be allowed. Allowances for plant and equipment rented under agreements that are not arms-length transactions should be similarly restrictive.

§9-50.1510-5 Overtime, shift, and holdiay premiums.

(a) Overtime, shift, and holiday premiums are allowable only to the extent provided in the contract or approved by the Contracting Officer. The amount of such premiums charged to a DOE contract shall be equitable in relation to the amount of such costs charged to other work currently performed in the contractor's plant and the factors which necessitate this incurrence of the cost. When the necessity for overtime, shift, and holiday work arises from inadequacy of the contractor's plant or department to perform its total workload on a purely straight-time basis, inclusions in overhead for apportionment to all work of the plant or department, as the case may be, appears appropriate. When particular work, DOE or other, is being specially expedited to a point that its fair share of the contractor's purely straight-time efforts on a single-shift basis will not get the particular job completed within the time desired, direct charging of the related premiums appears appropriate.

(b) When premiums for overtime, shift, and holiday work are charged direct to the work concerned, if the operating overhead of the plant or related department is distributed on the basis of direct labor (cost or hours), the premiums should be excluded from the direct labor base for purposes of the overhead distribution. That is, the direct labor base should be, as appropriate, direct labor straight-time costs or direct labor hours actually worked. While the premiums for authorized overtime, shift, and holiday work are acceptable as reimbursable costs, it is generally recognized that direct labor hours worked on an overtime, shift, or holiday basis should participate in indirect costs to the same extent as hours worked on a straight-time basis.

§9-50.1510-6 Outside technical and professional consultants.

Technical and professional consultants, as used here, refer to private individuals acting in their own behalf, who make their services available on a fee or per diem basis. It does not refer to employees of firms acting in the firm's behalf whose services may be made available by the firm on, for example, a fixed rate basis. Consultant arrangements may permit bringing to contract work, the services of outstanding specialists who would not be available on a full-time basis, or whose employment on a full-time basis would not be economically feasible. Costs of such outside consultant services are normally allowable (however, see §9-50.704-13(e)(26); §9-50.704-14(e)(24); and §9-50.704-16(e)(22) of this chapter regarding compensation of an individual who is employed by another contractor and concurrently performing work on a full-time annual basis under a DOE cost-type contract), provided that the services are essential to, and will make a material contribution to, the performance of contract work; the services may be performed more economically or more successfully by a consultant than by the contractor's regular personnel; the fee or per diem charged is reasonable; and when approved by the Contracting Officer. If the cost of such services is charged directly to the DOE contract, the cost of like items properly chargeable only to other work of the contractor must be eliminated from indirect costs allocable to the DOE contract (see §9-50.1509-1).

§9-50.1510-7 Preparatory and make-ready costs.

Since indirect costs are usually apportioned to individual jobs wholly or substantially on the basis of the direct labor applied to the particular job, a contract will absorb no overhead by apportionment prior to the inception of the actual performance of direct work on the contract. The effort of the contractor's overhead organization in preparing for one job and in getting it underway, will thus be absorbed by jobs previously commenced and still being performed; later, the job, which in its initial stages of preparation and make-ready was relieved of expenses that were actually applicable to it, will partially absorb, through their apportionment as overhead, similar costs equally applicable in fact to other, subsequently undertaken jobs. This procedure is in accordance with generally accepted accounting practices and normally is reasonably equitable in its results. The initial advantages and subsequent disadvantages to the individual contract that result from consistent application of the procedure tend to offset each other and balance out. It is quite appropriate, however, to employ the direct charge method in connection with overhead costs in preparing for actual performance by segregating such preparatory and make-ready costs and identifying them specifically with the contract to which the effort actually pertains. However, if preparatory and make-ready costs are charged direct to a DOE contract, care must be taken, as performance of the DOE contract work proceeds toward completion, to segregate subsequent indirect expenses similarly applicable to the preparation for, and commencement of, other jobs and to account for them as direct charges to these other jobs.

§9-50.1510-8 Severence pay.

(a) Severance pay is a payment, in addition to regular salaries and wages, but exclusive of payments for vested rights under pension plans, by an organization to personnel whose employment is terminated. Severance pay is allowable as a cost only to the extent that it is required by law, employer-employee agreement, or established policy that constitutes in effect an implied agreement on the contractor's part.

(b) Severance payments are divided into two categories as follows:

(1) Those due to normal, recurring turnover. The actual costs of such payments shall be regarded as expense applicable to the current fiscal year and equitably apportioned to the contractor's activities during that period. Accruals of such normal severance pay will be acceptable in lieu of actual severance pay, if the accruals are reasonable in the light of payments actually made due to normal severance over a representative past period.

(2) Those due to abnormal or mass terminations resulting from abrupt cessation of substantial work and inability of remaining work to afford continuing employment at the same level. The actual costs of such severance payments shall be regarded as expense applicable to the approximate average of the entire periods of employment of the terminated employees and equitably apportioned to the contractor's activities during such average period. (Accruals of such abnormal or mass severance pay are not allowable in view of its conjectural nature.)

(c) It will usually be acceptable to apportion severance payments on the basis of the ratio of total severance payments to a suitable base for the period established, pursuant to paragraph (b)(1) or (2) of this section, such as payrolls of all employees, direct salaries and wages, etc. The rate so determined shall be applied to the corresponding element of cost on the individual contracts. The rate should be determined on the basis of the operations of individual activities or other organizational units, such as departments, where such separate computations effect more accurate and equitable results. Severance pay should ordinarily not be considered as directly applicable to any particular contract or contracts. The foregoing applies to cost-type supply and research contracts with commercial organizations.

(d) Subject to paragraph (a) of this section, the following standards apply in determining allowability of costs for severance pay plans of operating contractors:

(1) Payments should be made only upon involuntary termination by reduction in force (RIF) of an employee which results in a permanent separation from the employment of the contractor. However, payments may also be made upon voluntary separation of an employee within a RIF grouping, but not otherwise scheduled for termination, which thereby eliminates the need for terminating another employee involuntarily.

(2) Payments should not be provided for in the event of (i) temporary layoffs, (ii) employment or offer of employment with a replacement contractor (employer) where continuity of employment with credit for prior length of service is preserved under substantially equal conditions of employment, (iii) early or normal retirement, or (iv) continued employment by the contractor at another facility, subsidiary, affiliate, or parent company of the contractor. Contractor employees should not have the option of refusing employment to receive severance pay.

§9-50.1510-9 Precontract costs.

Precontract costs are those incurred prior to the effective date of the contract directly pursuant to the negotiation and in anticipation of the award of the contract, where such incurrence is necessary to comply with the proposed contract delivery schedule. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the contract. They do not include costs of preparing bids or of participation in the negotiation. The allowability of precontract costs is dependent upon appropriate coverage in the contract.

§9-50.1510-10 Plant reconversion costs.

Plant reconversion costs are those incurred in the restoration or rehabilitation of the contractor's facilities to approximately the same condition existing immediately prior to the commencement of the contract work, fair wear and tear excepted.

§9-50.1510-11 Depreciation.

(a) Depreciation is allowable subject to the following:

(1) The charge represents normal depreciation on a contractor's plant and equipment.

(2) The charge to current operations is a distribution of the cost of acquisition of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset, in a systematic and logical manner.

(3) Any generally accepted accounting method consistently applied to the assets concerned having the approval of the Internal Revenue Service for Federal income tax purposes, if subject to the Internal Revenue Code of 1954, as amended, may be used including:

(i) The straight-line method;

(ii) The declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in subdivision (i) of this subparagraph;

(iii) The sum of the-years-digits method;

(iv) Any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the use of the property and including the current year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used, had such allowances been computed under the method described in subdivision (ii) of this subparagraph.

(4) If a nonprofit or tax-exempt organization, the method shall be such that it could have had the approval of the Internal Revenue Service, had the organization been subject to the Internal Revenue Code of 1954, as amended.

(5) The contractor must use the same approved method of depreciation for costing his contract work as for costing his other work at the same facility.

(6) The method of depreciation shall produce equitable and reasonable results.

(b) Depreciation of the following is unallowable:

(1) Idle or excess facilities (machinery and equipment), other than reasonable standby facilities;

(2) Assets fully amortized or depreciated on the contractor's books;

(3) Unrealized appreciation of values of assets; and

(4) Accelerated amortization under Certificates of Necessity or other system in excess of normal depreciation, as computed under paragraph (a) of this section.

(c) In entering into contracts involving the use of "special facilities" under section 161 of the Atomic Energy Act of 1954, as amended (section 7 of Public Law 85-681 approved Aug. 19, 1958), the percentage of the total cost of such special facilities devoted to contract performance and chargeable to the DOE should not exceed the ratio between the period of contract deliveries and the anticipated useful life of such facilities.

§9-50.1510-12 (Reserved).

§9-50.1510-13 (Reserved).

§9-50.1510-14 Compensation for personal services.

(a) Definition. Compensation for personal services includes all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees of the contractor during the period of contract performance. It includes, but is not limited to, salaries, wages, directors' and executive committee members' fees, bonuses (including stock bonuses), incentive awards, employee stock options, employee insurance, fringe benefits, and contributions to pension, annuity, management-employee incentive compensation plans, and location allowances.

(b) Allowability. For operating and on-site service contracts (as defined in §9-50.001), on-site construction, on-site architect-engineer contracts, and other contract situations where deemed appropriate (see §9-50.1506), allowable costs for compensation for personal services will be set forth in a personnel appendix in the contract. This personnel appendix shall be negotiated using the principles and policies of FPR subpart 1-15.2 as modified, implemented and supplemented by this subpart 9-50.1510-14, and other pertinent parts of the DOE-PR. For other contracting situations, except as otherwise specifically provided in this §9-50.1510-14, costs of compensation for personal services are to be treated as allowable to the extent that:

(1) Compensation paid in accordance with policies, programs, and procedures that effectively relate individual compensation to the individual's contribution to the performance of contract work, result in internally consistent treatment of employees in like situations, and effectively relate compensation paid within the organization to that paid for similar services outside the organization;

(2) Total compensation of individual employees is reasonable for the services rendered; and

(3) Costs are not in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder.

(c) Reasonableness. Compensation is reasonable to the extent that the total amount paid or accrued is comparable to compensation paid for similar work in the private competitive economy in the labor market in which the contractor competes. The application of this basic standard of reasonableness may vary according to the contract situation.

(1) When the contractor is substantially engaged in private competitive business, compensation paid employees on private work will usually be an acceptable standard of comparison for evaluating the reasonableness of compensation paid employees performing similar work under DOE contracts, provided that sufficient information is available to the DOE to permit a determination that compensation is, in fact, consistent.

(2) In other contract situations, information on compensation paid elsewhere in the labor market(s) for similar work, usually as measured by compensation surveys found acceptable by the DOE, will be the standard of comparison for evaluating the reasonableness of compensation paid employees engaged in work under DOE contracts.

(3) The standard of comparison (i.e., subparagraph (1) or (2) of this paragraph) for a particular contract situation is determined by the Contracting Officer after consideration of such factors as the extent and nature of the organization's private competitive business; extent to which contract work would be physically and organizationally integrated with private work; and the contractor's systems for determining, evaluating, and controlling compensation levels.

(4) It is DOE policy that contractors justify the reasonableness of proposed compensation costs and provide to the Contracting Officer any supporting information he deems necessary to his evaluation of reasonableness.

(d) Review and approval of compensation paid individual employees. In determining the reasonableness of compensation, the compensation of each individual contractor employee normally need not be subject to review and approval. Generally, the compensation paid individual employees should be left to the judgment of contractors subject to the limitations of DOE-approved compensation policies, programs, classification systems, and schedules, and amounts of money authorized for wage and salary increases for group of employees. However, in the case of operating and on-site contracts, all compensation due an individual of $45,000 or more shall require the Contracting Officer's or designee's review and approval. In addition, in the case of operating and on-site contracts, it will often be necessary that employee compensation be subjected to review and approval on an individual basis at a level below $45,000, when the Contracting Officer finds it appropriate for the particular situation. The contract shall specifically provide for the approval by the Contracting Officer of the cost of compensating an individual contractor employee above the level determined by the Contracting Officer, if a total of 50 percent or more of such compensation is reimbursed under DOE cost-type contracts. For purposes of determining the level for individual review and approval, total compensation as used in this paragraph includes only the employee's base salary and bonus or incentive compensations. As in the case of other personnel and compensation costs, it is intended that Contracting Officer review and approval of individual compensation normally will be prior to incurrence of costs.

(e) Special consideration in determining allowability. Certain conditions require special consideration and possible limitation as to allowability for contract cost purposes where amounts appear excessive. Among such conditions are the following:

(1) Compensation to owners of closely held corporations, partners, sole proprietors, or members of the immediate families thereof, or to persons who are contractually committed to acquire a substantial financial interest in the contractor's enterprise. Determination should be made that such compensation is reasonable for the actual personal services rendered rather than a distribution of profits.

(2) Any change in a contractor's compensation policy resulting in a substantial increase in the contractor's level of compensation, particularly when it is concurrent with an increase in the ratio of Government contracts to other business, or any change in the treatment of allowability of specific types of compensation due to changes in Government policy.

(3) Compensation in lieu of salary for services rendered by partners and sole proprietors will be allowed to the extent that it is reasonable and does not constitute a distribution of profits.

(f) Limitations on certain forms of compensation. In addition to the general requirements in paragraphs (a) through (e) of this section, certain forms of compensation are subject to further requirements, as specified in paragraphs (g) through (o) of this section.

(g) Salaries and wages. Salaries and wages for current services include gross compensation paid to employees in the form of cash, products, or services, and are to be treated as allowable. However, premiums for overtime in excess of statutory requirements, extra-pay shifts, and multishift work are to be treated as allowable to the extent approved by the Contracting Officer.

(h) Bonuses and incentive compensation. Incentive compensation and cash bonuses based on production, cost reduction or efficient performance, suggestion awards, and safety awards are to be treated as allowable, to the extent that the contractor's overall compensation plan is determined to be reasonable and such costs are paid or accrued, pursuant to an agreement entered into in good faith between the contractor and the employees before the services were rendered, or pursuant to an established plan followed by the contractor so consistently as to imply, in effect, an agreement to make such payment (but see §9-50.1506). In determining reasonableness, it will be necessary to take into account, not only bonuses and incentive compensation payments charged directly to the contract, but also payments charged indirectly to the contract through overhead. Bonuses, awards, and incentive compensation, when any of them are deferred, are to be treated as allowable to the extent provided in paragraph (k) of this section.

(1) Bonuses and incentive compensation paid to employees other than those whose pay is directly reimbursed will not be made allowable in on-site construction, on-site architect-engineer, and operating contracts, where home office general and administrative expense is unallowable.

(2) Employer contributions to incentive compensation plans for the purpose of establishing a reserve for the payment of incentive compensation for services performed in the future are unallowable.

(i) Bonuses and incentive compensation paid in stock. Costs of bonuses and incentive compensation paid in the stock of the contractor or of an affiliate are to be treated as allowable, to the extent set forth in paragraph (h) of this section (including the incorporation of the principles of paragraph (k) of this section for deferred bonuses and incentive compensation), subject to the following additional requirements:

(1) Valuation placed on the stock transferred shall be the fair market value at the time of transfer, determined upon the most objective basis available; and

(2) Accruals for the cost of stock prior to the issuance of such stock to the employees shall be subject to adjustment, according to the possibilities that the employees will not receive such stock and their interest in the accruals will be forfeited. Such costs otherwise allowable are to be made subject to adjustment, according to the principles set forth in paragraph (k)(3) of this section. (But see §9-50.1506.)

(j) Stock options. The cost of options to employees to purchase stock of the contractor or of an affiliate is to be made unallowable.

(k) Deferred compensation.

(1) As used herein, deferred compensation includes all remuneration, in whatever form, for which the employee is not paid until after the lapse of a stated period of years, or the occurrence of other events as provided in the plans, except that it does not include normal end

of accounting period accruals. It includes (i) contributions to pension, annuity, stock bonuses, and profit-sharing plans; (ii) contributions to disability, withdrawal, insurance, survivorship, and similar benefit plans; and (iii) other deferred compensation, whether paid in cash or in stock.

(2) Deferred compensation is to be treated as allowable to the extent that (i) except for past service pension and retirements costs, it is for services rendered during the contract period; (ii) it represents, together with all other compensation, a reasonable overall compensation plan; (iii) it is paid pursuant to an agreement entered into in good faith between the contractor and employees before the services are rendered, or pursuant to an established plan followed by the contractor so consistently as to imply, in effect, an agreement to make such payments; and (iv) for a plan which is subject to approval by the Internal Revenue Service, it falls within the criteria and standards of the Internal Revenue Code and the regulations of the Internal Revenue Service. (But see §9-50.1506.)

(3) For determining the allowable cost of deferred compensation, contractual provision shall be made for appropriate adjustments for credits or gains, including those arising out of both normal and abnormal employee turnover, or any other contingencies that can result in a forfeiture by employees of such deferred compensation. Adjustments shall be made only for forfeitures which directly or indirectly inure to the benefit of the contractor; forfeitures which inure to the benefit of other employees covered by a deferred compensation plan with no reduction in the contractor's costs will not normally give rise to adjustment in contract costs. Adjustments for normal employee turnover shall be based on the contractor's experience and on foreseeable prospects, and shall be reflected in the amount of cost currently allowable. Such adjustments will be unnecessary to the extent that the contractor can demonstrate that his contributions take into account normal forfeitures. Adjustments for possible future abnormal forfeitures shall be effected according to the following rules:

(i) Abnormal forfeitures that are foreseeable and which can be currently evaluated with reasonable accuracy, by actuarial or other sound computation, shall be reflected by an adjustment of current costs otherwise allowable; and

(ii) Abnormal forfeitures, not within subdivision (i) of this subparagraph, may be made the subject of agreement between the Government and the contractor, either as to an equitable adjustment or a method of determining such adjustment.

(4) In determining whether deferred compensation is for services rendered during the contract period or is for future services, consideration shall be given to conditions imposed upon eventual payment, such as, requirements of continued employment, consultation after retirement, and covenants not to compete.

(l) Fringe benefits. Fringe benefits are allowances and services provided by the contractor to his employees, as compensation, in addition to regular wages and salaries. Subject to the determination that total compensation is reasonable (see §9-50.1510-14(c)), costs of fringe benefits such as pay for vacations, holidays, sick leave, military leave, employee insurance, pension, and retirement plans, and supplemental unemployment benefit plans are to be treated as allowable, provided such fringe benefits meet the following conditions:

(1) The benefits contribute to the performance of contract work and are appropriate for reimbursement from public funds;

(2) Such benefit plans as exist in the contractor's private operations that are inconsistent with DOE published requirements are appropriately modified or disallowed;

(3) Employee benefit plans especially established to meet the particular needs of the contract are in conformity with published DOE policy and standards;

(4) Appropriate controls under the contract are established to assure that employees on contract work are treated no more or no less favorably than employees in the contractor's private operation, except to the extent that subparagraphs (2) and (3) of this paragraph apply;

(5) To the fullest extent possible, definite limitations or terminal points are established for each of the various benefit plans, so that DOE's full liability with respect thereto is established under the contract; and

(6) DOE has access to all information necessary to complete understanding of the means of computing or determining the cost of the benefits afforded contract employees and their dependents under the benefit plans.

(m) Severance pay. See §9-50.1510-8.

(n) Training and education expenses. See §9-50.704-13, 9-50.704-14 and §9-50.704-16(d)(8)(v).

§9-50.1510-15 Air travel.

It is the policy of the DOE to require the use of less than first-class air accommodations for all cost-reimbursed travel, except when less than first-class accommodations are not reasonably available to meet necessary mission requirements. For example, less than first-class accommodations are considered not reasonably available where less than first-class accommodations would:

(a) Require circuitous routing,

(b) Require travel during unreasonable hours,

(c) Greatly increase the duration of the flight,

(d) Result in additional costs which would offset the transportation savings, or

(e) Offer accommodations which are not reasonably adequate for the medical needs of the traveler.

The difference in cost between first-class air accommodations and less than first-class accommodations is an unallowable cost, except as provided for in this section.

§9-50.1510-16 Page charges in scientific journals.

It is a policy of the DOE to permit DOE contractors to budget for and pay page charges for scientific journal publication, as a necessary part of research costs, in all cases where:

(a) The research papers report work supported by the Government.

(b) The charges are levied impartially on all research papers published by the journal, whether by non-Government or by Government authors.

(c) Payment of such charges is in no sense a condition for acceptance of manuscripts by the journal.

(d) The journals involved are not operated for profit.

(e) The author does not receive an emolument from the journal for the research paper.

§9-50.1510-17 Special funds in the construction industry.

Costs of special "funds," financed by employer contributions, in the construction industry for such purposes as methods and materials research, public and industry relations, market development, disaster relief, etc., are unallowable, except as specifically provided in the contract.

§9-50.1510-18 Employee morale, health, welfare, food service, and dormitory costs.

(a) Employee morale, health, and welfare activities are those services or benefits provided by the contractor to its employees to improve working conditions, employer-employee relations, employee morale, and employee performance. These activities include such items as house or employee publications, health or first-aid clinics, recreation, employee counseling services and, for the purpose of this section, food service and dormitory costs. However, these activities do not include, and should be differentiated from, compensation for personal services as defined in §9-50.1510-14. Food and dormitory services include operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations, or similar types of services for the contractor's employees at or near the contractor's facilities or site of the contract work.

(b) Except as limited by paragraph (c) of this section, the aggregate of costs incurred on account of all activities mentioned in paragraph (a) of this section, less income generated by all such activities, is allowable to the extent that the net aggregate cost of all such activities, as well as the net cost of each individual activity, is reasonable and allocable to the contract work. Additionally, advance understandings with respect to the costs mentioned in paragraph (a) of this section are to be reached prior to the incurrence of these costs as required in §9-50.1506.

(c) Losses from the operation of food and dormitory services may be included as costs incurred under paragraph (b) of this section, only if the contractor's objective is to operate such services at least on a break-even basis. Losses sustained because food services or lodging accommodations are furnished without charge or at prices or rates which obviously would not be conducive to accomplishment of the above objective, are not allowable, except in those instances where the contractor can demonstrate that unusual circumstances exist, such that, even with efficient management, operation of the services on a break-even basis would require charging inordinately high prices, or prices or rates higher than those charged by commercial establishments offering the same services in the same geographical areas. Typical examples of such unusual circumstances are: (1) where the contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available, or (2) where it is necessary to operate a facility at a lower volume than the facility could economically support. Cost of food and dormitory services shall include an allocable share of indirect expenses pertaining to these activities.

(d) In those situations where the contractor has an arrangement authorizing an employee association to provide or operate a service such as vending machines in the contractor's plant, and retain the profits derived therefrom, such profits shall be treated in the same manner as if the contractor were providing the service (but see par. (e) of this section).

(e) Contributions by the contractor to an employee organization, including funds set over from vending machine receipts or similar sources, may be included as cost incurred under paragraph (b) of this section, only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable, if incurred by the contractor directly.

§9-50.1510-19 Procurements or transfers from contractor-controlled sources by certain cost-type contractors (See §9-50.302-4).

Allowance for all equipment, materials, supplies, and services which are sold or transferred between any division, subsidiary, or affiliate of the contractor under a common control shall be on the basis of cost incurred in accordance with the terms of the contract, except when it is the established practice of the transferring organization to price inter-organization transfers of equipment, materials, supplies, and services at other-than-cost for commercial work of the contractor or any division, subsidiary, or affiliate of the contractor under a common control, allowance may be at a price when:

(a) It is based on an "established catalog or market price of commercial items sold in substantial quantitites to the general public" in accordance with FPR 1-3.807-1(b)(2); or

(b) It is the result of "adequate price competition" in accordance with FPR 1-3.807-1(b)(1) (i) and (ii), and is the price at which an award was made to the affiliated organization, after obtaining quotations on an equal basis from such organization and one or more outside sources which normally produce the item or its equivalent in significant quantity, provided that in either case:

(1) The price is not in excess of the transferor's current sales price to his most favored customer (including any division, subsidiary, or affiliate of the contractor under a common control) for a like quantity under comparable conditions, and

(2) The price is not determined to be unreasonable by the Contracting Officer, provided, however, that if the price is determined unreasonable, such determination must be supported by an enumeration of facts on which it is based and approved at a level above the Contracting Officer.

The price determined in accordance with paragraph (a) of this section should be adjusted, when appropriate, to reflect the quantities being procured and may be adjusted upward or downward to reflect the actual cost of any modifications necessary because of contract requirements.

§9-50.1510-20 Relocation costs.

(a) Relocation costs, for the purpose of this Subpart 9-50.15, are costs incident to the permanent change of duty assignment of an existing employee for a period of no less than 12 months or upon recruitment of a new employee.

(b) Relocation costs may include, but are not limited to, the type of costs covered in paragraphs (c) and (d) of this section and are allowable to the extent therein set forth, provided:

(1) The move is for the benefit of the employer;

(2) Reimbursement is in accordance with an established policy or practice consistently followed by the employer in connection with his private operations, and such policy or practice is designed to motivate employees to relocate promptly and economically;

(3) The costs are not otherwise unallowable under the provisions of the contract or any other paragraph of this Subpart 9-50.15; and,

(4) The amounts to be reimbursed shall not exceed the actual (or reasonably estimated) expenses.

(c) Allowable relocation costs include the following types of expenses:

(1) Travel expenses, including costs of transportation, lodging, subsistence, and reasonable incidental expenses of the employee and members of his immediate family and transportation of his household and personal effects to the new location.

(2) Expenses incurred incident to locating a new home, such as advance trips by employees and spouses to locate living quarters, and temporary lodging and subsistence. The period for incurrence of costs of the type covered in this subparagraph (2) shall be kept to the minimum number of days necessary under the circumstances but shall not, in any event, exceed a cumulative total of 30 days, including advance trip and travel time.

(3) Other necessary and reasonable expenses normally incident to relocation, such as costs of canceling an unexpired lease, disconnecting and reinstalling household appliances, and purchase of insurance against damages to or loss of personal property. Cost of canceling an unexpired lease under this subparagraph shall not exceed three times the monthly rental.

(d) The following types of relocation expenses are allowable but the combined total of costs covered in subparagraphs (1) and (2) of this paragraph shall not exceed 8 percent of the sales price of the property sold:

(1) Closing costs (i.e., brokerage fees, legal fees, appraisal fees, etc.) incident to the sale of the actual residence owned at old location by the employee when notified of the transfer;

(2) Continuing costs of ownership of the vacant former actual residence being sold, such as maintenance of building and grounds (exclusive of fixing-up expenses), utilities, taxes, property insurance, etc., after settlement date or lease date of new permanent residence.

(e) Relocation costs incurred incident to recruitment of new employees are subject to this §9-50.1510-20, except that expenses of the type covered in paragraphs (c)(3) and (d)(1) and (2) of this section are allowable only in connection with the relocation of existing employees and are not allowable for newly recruited employees. Where relocation costs incurred incident to recruitment of a new employee have been allowed, either as an allowable direct or indirect cost and the newly hired employee resigns for reasons within his control within 12 months after hire, the contractor shall be required to refund or credit such relocation costs to the Government.

(f) Relocation costs of the following types are unallowable whether incurred by the employee or by the employer:

(1) Loss on sale of home;

(2) Acquisition of a home in a new location (e.g., brokerage fees, legal fees, appraisal fees, etc.);

(3) Continuing mortgage principal and interest payments on residence being sold; and

(4) Payments for employee income taxes incident to reimbursed relocation costs.

§ 9-50.1510-21 Subcontracts.

Award and management policies for subcontracts placed under operating contracts when necessary to the performance of the required services and work efforts of the operating contractor are set forth in Subpart 9-50.3 of this Part 9-50. The cost of performing such subcontracts shall be allowable under the DOE contract when (i) the award/approval is otherwise in accord with the contract terms and conditions and the provisions of Subpart 9-50.3 and (ii) the reimbursement of subcontractor costs by the operating contractor is in accordance with the provisions of the DOE cost principles set forth in Part 9-15, as appropriate to the type of subcontractor being selected, i.e., commercial, educational, state/local government, or nonprofit organization.

Subpart 9-50.18 Procurement of Construction

§9-50.1800 Scope of subpart.

This subpart sets forth contracting procedures peculiar to construction work performed by operating and other on-site contractors and their subcontractors. Provisions of FPR 1-18 and Part 9-18 also apply.

§9-50.1801 General provisions.

§9-50.1801-1 Government estimates.

A Government estimate of costs shall be prepared for construction subcontracts under operating contracts. The services of the architect-engineer, operating contractor, or construction contractor will be used as appropriate in the preparation of Government estimates.

§9-50.1801-2 Specifications.

DOE publication entitled, "Design Criteria," (formerly ERDAM Chapter 6300) shall be complied with in preparing specifications for construction work.

§9-50.1802 Subcontracting policies and procedures.

The provisions of FPR 1-18.305(b) and §9-50.3 apply to the procurement of construction services by operating and on-site service contractors.

§9-50.1803 Buy American Act.

The requirements of FPR Subpart 1-18.6 and § 9-18.6 apply to operating and other on-site contractors' procurement. Contractors may be authorized by the Head of the Procuring Activity to make determinations of nonavailability under FPR 1-18.602-1(b) for individual items under individual construction subcontracts awarded by them. Contractors may initiate the requests for determinations of impracticability in accordance with FPR 1-18.602-1(a), and requests for deviations from the FPR 1-18.603 procedures for determination of unreasonable cost. Such requests shall be forwarded to the Senior Procurement Official, Headquarters, after concurrence by the Head of the Procuring Activity.

§9-50.1804 Labor standards.

The provisions of FPR Subpart 1-18.7 and §9-18.7 shall be followed in determining whether an operating or on-site service contractor's procurement actions involve covered work under the Davis-Bacon Act and such provisions apply to those procurement transactions which are determined by the Contracting Officer to be subject to that Act.

§9-50.1804-1 Contract clauses.

Subcontracts subject to the Davis-Bacon Act under operating contracts shall include the applicable clauses in FPR 1-18.703, with such modifications as appropriate to reflect the prime-subcontract relationship.

Paragraph (f) of the clause in FPR 1-18.703-1(a) shall be modified to delete reference to a prime contract subject to the Davis-Bacon Act.

§9-50.1804-2 Special clause for operating contracts.

The following article is for use in prime contracts when the prime contractor is to perform no covered work with his own forces but may procure construction by subcontract:

> "Upon request of the Contracting Officer and acceptance thereof by the contractor, the contractor shall procure, by subcontract, the construction of new facilities or the alteration or repair of Government-owned facilities at the plant. Any subcontract entered into under this paragraph shall be subject to the written approval of the Contracting Officer and shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, on a public building or public work."

OMB CONTROL NO.: 1901—0021.

§9-50.1805 Inspection.

(a) Inspection services may be performed by the architectengineer responsible for the design. Inspection services may not be procured from a fixed-price construction contractor with respect to its own work. Under cost-reimbursement type subcontracts where the construction and architect-engineer are the same, some degree of self-inspection may be permitted, but shall not constitute final inspection and acceptance by the Government.

(b) When one contractor is to inspect the work of another, the inspecting contractor will be given written instructions defining its responsbilities and stating that it is not authorized to: modify the terms and conditions of the contract, direct additional work, waive any requirements of the contract, or settle any claims or dispute. Copies of the instructions will be given to the contractor who is to be inspected, with a request to acknowledge receipt on one copy and return it to the Contracting Officer. In this manner, both contractors are on notice as to the authority and limitations on the authority of the inspecting contractor.

OMB CONTROL NO.: 1901—0021.

Subpart 9-50.20 Retention Requirements for Contractor and Subcontractor Records.

§9-50.2001 Applicability.

The requirements of FPR Part 1-20 do not apply to operating and on-site service contractors and cost-reimbursement type subcontracts thereunder. (§9-50.704-9)

§ 9-50.2002 (Reserved)

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PART 9–51 REVIEW AND APPROVAL OF CONTRACT ACTIONS

§9–51.000 Scope of part.

This part sets forth administrative requirements for the review and approval of certain contract actions.

§9–51.001 Definition.

(a) For the purpose of this part, the term "contract actions" includes:

(1) Actions relating to the letting of contracts, subcontracts, agreements with other governmental agencies, and subsequent modifications, extensions, and settlements of terminations thereof.

(2) Questions of contract policy or procedure which arise in the course of contract negotiation and administration.

(b) For the purpose of this part, the term "contract actions" does not include administrative functions associated with contract administration, such as the development, interpretation, and modification of contract cost principles, financial plan and budget operations, labor relations, safety, security, audit, salary and wage administration, foreign travel, programmatic matters (program scope, technical requirements or specifications, project schedules, etc.), and the administration of construction activities. Such matters are handled directly between field offices and the Headquarters' organization having cognizance over the matter involved.

(c) For the purpose of this part, the term "contract actions" does not include the action taken to terminate a contract, subcontract, or agreement with another governmental agency. See §9–8.201 for requirements relating to the act of termination.

Subpart 9–51.1 Headquarters' Review and Approval of Contract Actions

§9–51.100 Scope of subpart.

This subpart sets forth the administrative requirements for Headquarters' review and approval of contract actions.

§9–51.101 General instructions regarding submissions to Headquarters.

(a) Procuring activities will communicate directly with the Senior Procurement Official, Headquarters, on all contract actions requiring Headquarters consideration, with the following exceptions:

(1) The offices at Schenectady and Pittsburgh will communicate through the Director, Division of Naval Reactors.

(2) The Grand Junction Office will communicate through the Assistant Secretary, Resource Applications.

(3) The CRBRP and FFTF Project Office will communicate through the Assistant Secretary, Energy Technology.

(b) Contract actions requiring Headquarters' review and approval shall be submitted sufficiently in advance of the proposed date for final action to permit an orderly study and analysis of the proposed contract action. Requests for approval of contracts and subcontacts shall be accompanied by six copies of the proposed contract document and six copies of the required supporting data. The Senior Procurement Official, Headquarters, will obtain appropriate Headquarters review and comments, including the lead program office, General Counsel, and other appropriate Headquarters' staff elements.

§9-51.102 Contract actions requiring advance Headquarters' review and approval.

(a) Contract actions likely to provoke unusual public interest or contractual matters of a new or unusual nature. Heads of Procuring Activities will submit to the Senior Procurement Official, Headquarters', such contract actions for appropriate Headquarters review and approval.

(b) Contract actions in excess of authority delegated to Heads of Procuring Activities. Heads of Procuring Activities will submit to the Senior Procurement Official, Headquarters, contract actions in excess of delegated authority for appropriate review and approval including:

(1) Preliminary contractual agreements when there is reason to believe that the resulting contract or subcontract may exceed delegated authority.

(2) Any proposed contract or subcontract which by the exercise of any option or options therein would exceed delegated authority.

(3) Any initial proposed contract or subcontract, regardless of amount, which in the opinion of the Head of the Procuring Activity may as a result of extension, follow-up work, or otherwise increase the contract or subcontract, or lead to a contract or subcontract with the same contractor, in an amount in excess of the delegated authority.

(4) Extension or modification which within itself includes increases in excess of delegated authority.

(5) In the case of cost-shared contracts, the estimated cost shall be considered to be the sum of the contractor and Government shares for the purpose of ascertaining whether Headquarters review and approval is required.

(c) For contracts or subcontracts previously approved by Headquarters, modifications thereto need not be submitted for Headquarters' consideration when they involve only periodic modifications (1) to establish scope and/or estimated costs within the approved general scope and fixed fees, provided the fee negotiated is within the fee limits of DOE fee policy, or (2) to increase (or decrease) the funds obligated or the contractual limitations on expenditures when funds for such purposes have been allotted and set forth in approved financial plans.

(d) Contracts and subcontracts for public utility services (except telecommunication services) shall be reviewed and approved in accordance with the provisions of Subpart 9-50.401 Public Utilities.

§9-51.103 Supporting data for contract actions requiring Headquarters' advance approval.

§9-51.103-1 Negotiation.

Requests for approval of contracts and subcontracts to be entered into, as a result of negotiation, shall be accompanied by the information and supporting data in accordance with current Headquarters directives.

§9-51.103-2 Formal advertising.

Requests for approval of contracts and subcontracts to be entered into as a result of formal advertising shall be accompanied by the information and supporting data required by current Headquarters' directives.

§9-51.103-3 Questions of contract policy and procedure.

Questions of contract policy and procedure which arise in the course of contract negotiation and administration for which Headquarters' consideration is required or desired, shall be accompanied by sufficient information to permit adequate review and analysis of the problem involved.

§9-51.103-4 Time of submission.

Requests for approval of contractual documents shall be submitted and approval shall be obtained, prior to execution by either party.

§9-51.103-5 Determinations and findings.

All determinations and findings required by FPR Subparts 1-3.2 and 1-3.3 and DOE-PR Subparts 9-3.2 and 9-3.3, with the exception of FPR 1-3.303 and DOE-PR §9-3.303, shall be executed by a Contracting Officer and a signed copy shall be included in the supporting data for contract actions when the file is required to be sent to Headquarters for advance approval.

Subpart 9-51.2 Other Approval Requirements

§9-51.201 Other approval requirements.

Nothing in this Part 9-51 shall be construed as precluding the establishment of additional requirements by Headquarters or Heads of Procuring Activities with respect to contracts or subcontracts under their jurisdiction.

Subpart 9-51.3 Contract and Subcontract Review Requirements

§9-51.300 Scope of subpart.

This subpart sets forth the administrative requirement for independent review of proposed contracts and subcontracts by DOE.

§9-51.301 Applicability.

Prime contracts and subcontracts under cost-reimbursement type contracts shall be reviewed in conformance with this subpart, based on dollar thresholds to be established by Heads of Procuring Activities. Such reviews shall be made prior to award in all cases.

§9-51.302 Responsibilities.

Each Head of the Procuring Activity shall establish procedures, in accordance with this subpart, providing for an independent review of proposed contract and subcontract actions and to review termination settlements.

§9-51.303 Assignment of review functions.

Responsibility for independent review of contract and subcontract actions shall be assigned to a contract review board established under §9-51.303-1, or such independent review shall be accomplished under the alternate review procedures set forth in §9-51.303-2.

§9-51.303-1 Contract review boards.

(a) Organization. Each contract review board shall consist of not less than three members with broad business and contracting experience. A majority of representatives on each board shall be permanent board members. Other members may be drawn from panels of designated persons as may be appropriate for cases under consideration. To the extent practicable, no person shall serve as a member of a contract review board in reviewing a contract action in which he has participated, or a contractor selection, unless such action is subject to approval under §9-51.102, or the Head of the Procuring Activity shall determine that participation in the review of the particular contract provides continuity of experience or is otherwise in the best interest of the Government. The chairman of each board shall be designated by the Head of the Procuring Activity concerned and each board shall be furnished with such staff assistance as may be requested by the board and approved by the Head of the Procuring Activity. Contract review boards may be assigned additional functions at the discretion of Heads of Procuring Activities, provided such functions are related to procurement and are not inconsistent with the board's responsibility as set forth in this subpart.

(b) Purpose of review. In negotiated procurements, the primary function of contract review is to provide an independent review and analysis of contract and subcontract actions for the purpose of determining whether the negotiations (1) were competently conducted, (2) were based on adequate information, (3) were in conformance with established policies and procedures, and (4) resulted in a contract or subcontract with a responsible contractor and that adequately protects the interests of the Government, including the reasonableness of the fixed fee (if any) in cost-type procurements, the reasonableness of price in fixed-price type contracts or subcontracts including the reasonableness of intermediate or final repricing with comparison of the proposed price with the independent Government cost estimate, if applicable. With respect to awards resulting from formal advertising, review will include such matters as determining the responsibility of the contractor; the reasonableness of the price of the proposed award, including comparison with the independent Government cost estimate, if applicable; the adequacy of competition, the advisability of rejecting all bids and readvertising or negotiating; and, in the case of a proposed award to other than the low bidder, whether such action is in the best interest of the Government.

(c) Method and extent of review. When a review is required by this Part 9-51 or for termination settlements, the Contracting Officer (or the contractor in case of subcontracts) shall submit a statement justifying the proposed action with such detailed information as may be required for an adequate review. Procedures for the submission of such statements shall be issued by each procuring activity. Contract review boards shall determine the overall reasonableness of proposed actions from the standpoint of protecting the interests of the Government. Such boards may vary the scope and extent of reviews according to the size and complexity of individual cases and other relevant factors.

(d) Results of review. Contract review boards shall document the scope and extent of the review and submit written recommendations to Heads of Procuring Activities (or to such other approving officials as may be appropriate) on each proposed contract or subcontract action reviewed. In the event the approving official departs from the recommendation of the review board, the basis for such action shall be appropriately documented in the files.

§9-51.303-2 Alternate review procedures.

Where it is impracticable to establish a contract review board, or where additional procedures are appropriate to supplement a contract review board, the following procedures shall be followed:

(a) Contracts and subcontracts to be entered into as a result of formal advertising and subcontracts which meet the criteria established in §9-50.302, may be reviewed by such alternate procedures as may be prescribed by Heads of Procuring Activities.

(b) Contracts and subcontracts other than those covered in paragraph (a) may be reviewed by such alternate procedures as may be prescribed by Heads of Procuring Activities, provided:

(1) In the judgment of the Heads of Procuring Activities concerned, supplemental procedures are necessary, or it is impracticable to establish a contract review board;

(2) The alternate procedures assure an adequate independent review of contract and subcontract actions; and

(3) The following principles are observed in establishing the alternate procedures:

(i) Contract or subcontract actions requiring review under a field office (or area office with respect to contract and subcontract actions within the approval authority of an area manager, in those instances where area managers have been delegated contracting or approval authority in excess of the independent review threshold established by the Head of the Procuring Activity) to the fullest extent practicable shall be reviewed by the same reviewers, regardless of the nature of the work under the individual contracts, in order to assure continuity of experience and uniformity of treatment.

(ii) Reviewers shall have a broad background of business and contracting experience in private industry or Government.

(iii) Advice in specialized fields such as engineering, law, and accounting shall be readily available to the reviewers.

(iv) Reviewers shall not negotiate or assist in the negotiation of any contract or subcontract, including contractor selection, except when the contract or subcontract shall be subject to approval under §9-51.102, or where the approving authority shall determine that the reviewer's participation provides continuity of experience or is otherwise in the best interest of the Government.

(c) The requirement of §9-51.303-1 (b), (c), and (d), with respect to contract review boards shall be met.

Subpart 9-51.4 Contracts or Subcontracts Requiring Advance Notice

§9-51.400 Scope of subpart.

Notice of intent to enter into contracts or subcontracts within the categories set forth below shall be required as indicated therein. These requirements are not established for approval purposes but are for information only.

§9-51.401 Contracts let under long-term contract authority.

Heads of Procuring Activities shall advise the Controller, with a copy to the Senior Procurement Official, Headquarters, of any intent to utilize the long-term contract authority provided by subsection U, section 161 of the Atomic Energy Act of 1954, as amended by Public Law 85-681 (72 Stat. 633). Such advance notice should be provided at an early stage of planning on any such proposed contract action.

Subpart 9-51.5 Clearance of Forms for Collection of Information

§9-51.500 Scope of subpart.

This subpart sets forth requirements for the clearance of forms for collection of information with the Office of Management and Budget.

§9-51.501 Actions requiring clearance.

In accordance with the Federal Reports Act of 1942 (44 U.S.C. 3501 et seq.) and Office of Management and Budget Circular A-40, as revised, forms and reports under contracts and subcontracts which will result in the collection of information on identical items at the request of or for DOE by the contractor or subcontractor from 10 or more respondents (other than Federal employees), require clearance from the Assistant Director of the Office of Management and Budget in advance of the adaption or use of such forms or reports.

§9-51.502 Procedure for obtaining clearance, extension of clearance, or exemption.

Requests for clearance of forms or reports or material revision or changes in previously approved forms or reports, or extension of clearance beyond scheduled expiration date, or exemption from Clearance shall be submitted to the Senior Procurement Official, Headquarters, for coordination with and transmittal by the Controller to the Assistant Director of the Office of Management and Budget. Such requests shall be in the form and contain all of the pertinent information required by paragraphs 4, 5, 6, and 7 of OMB Circular A-40.

Subpart 9-51.6 Justification of Procurements

§9-51.600 Scope of subpart.

This subpart sets forth the type of information required for justification of procurements.

§9-51.601 Formal advertising.

Justification for formally advertised procurements shall consist of the information required by current Headquarters' directives.

§9-51.602 Negotiated procurements.

§9-51.602-1 Applicability.

This section is applicable to all negotiated contracts including letter contracts, and modifications thereof, involving additional supplies or services, except: (a) contracts or subcontracts for $10,000 or less, (b) orders against Federal Supply Schedules, (c) orders placed against other Government agencies, and (d) orders placed against other DOE offices.

§9-51.602-2 Justification of negotiated contracts.

See §9-51.103-1.

PART 9-52 PROCUREMENT INSTRUMENT, SOLICITATION AND PROCUREMENT REQUEST NUMBERS (RESERVED)

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For the period before January 1, 1973, see the "List of CFR Sections Affected, 1949-1963, and 1964-1972," published in three separate volumes.

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